

CHILD ABUSE REPORTING LAWS AND ATTORNEY-CLIENT CONFIDENCES: THE REALITY AND THE SPECTER OF LAWYER AS INFORMANT

ROBERT P. MOSTELLER†

INTRODUCTION

Child abuse is a societal problem of tragic proportions in America. On a yearly basis, over two million reports of child abuse and neglect are made to state child protective service agencies,¹ over one million children suffer demonstrable harm as a

† Professor of Law, Duke University. B.A. 1970, University of North Carolina at Chapel Hill; J.D. 1975, Yale University; M.P.P. 1975, Harvard University. I would like to thank my colleagues Katharine T. Bartlett, Sara Sun Beale, and Theresa A. Newman Glover, as well as Steven Goode and Geoffrey C. Hazard for their very helpful comments on an earlier draft of this paper. I would also like to thank my research assistants Jeanne Meyer, Bryan West, James Worthington, and Diana Younts for their valuable help.

1. In 1989, there were 2.4 million reports of child abuse. NATIONAL CENTER ON CHILD ABUSE PREVENTION RESEARCH, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE 1989 ANNUAL FIFTY STATE SURVEY 2 (1990) [hereinafter CURRENT TRENDS].

While precise comparison of figures from year to year, even with respect to abuse reports, is difficult because of changes in definition and variation in reporting procedures among the states, the number of reported child abuse cases rose dramatically during the 1980s. The increase can be demonstrated through a variety of sources, such as studies prepared by the American Humane Society. One such study shows an increase in child abuse reports from 669,000 in 1976 to 2,178,000 in 1987. AMERICAN HUMANE ASS'N, 1987 HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 5 (1989).

Because of their sophistication and consistency, two federal studies conducted during the 1980s provide excellent sets of data for comparison. For a one-year period covering the last half of 1979 and the first half of 1980, a total of 1.1 million children were reported to Child Protective Services as suspected victims of child abuse or neglect. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEPT OF HEALTH & HUMAN

result of abuse and neglect,² and over eleven hundred children die

SERVICES, STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 39 (1981) [hereinafter 1981 STUDY FINDINGS]. In 1986, Child Protective Services received reports concerning more than 1.65 million children, a 57% increase. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988, at 6-1 (1988) [hereinafter 1988 STUDY FINDINGS].

How to interpret the increase in the number of reported cases is a matter of some dispute. It may be that abuse has increased dramatically, or that either recognition or reporting rates have risen. There is reason to believe that, at least in the first part of the decade, the major reason for the increasing number of reports was a greater likelihood of recognition of child abuse by professionals rather than a dramatic increase in the incidence of abuse. 1988 STUDY FINDINGS, *supra*, at 3-12 to 3-13, 6-4, 7-9 to 7-10 (inferring from the relative stability of severe abuse and dramatic increases only in marginal types of impairment that it was a greater ability to recognize abuse, as opposed to an increase in actual rates of abuse, that produced higher levels of reported cases, because truly higher rates of abuse should logically have produced increases across all categories). Others suggest that increase in maltreatment may also be occurring as a result of increases in social problems that contribute to abuse, such as homelessness, poverty, and particularly substance abuse. See, e.g., CURRENT TRENDS, *supra*, at 3-5; see also J. Michael Murphy et al., *Substance Abuse and Serious Child Mistreatment: Prevalence, Risk, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 197, 207-10 (1991) (indicating correlation between substance abuse and some of the worst aspects of abuse); Nancy Lewis, *When Home Isn't a Haven; D.C. Seeks the Safest Place for Children Facing Abuse*, WASH. POST, June 8, 1992, at A1 (documenting increase in child abuse and neglect cases in 1992 and growing link to drug use within the family).

Another explanation for the increasing number of reported cases is over-reporting of abuse. Many of the reports that are filed go unsubstantiated. For 1979-1980, only 42.7% of the reports were substantiated. 1981 STUDY FINDINGS, *supra*, at 12. Depending upon the data analysis used, the percentage substantiated for 1986 either remained about the same, AMERICAN HUMANE ASS'N, 1986 HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 11 (1988), or increased to 53%, 1988 STUDY FINDINGS, *supra*, at 6-6. The fact that a report is "unsubstantiated" should not be taken to mean that it was without foundation, as numerous explanations, from excessive agency workloads that prevent full investigation to an inadvertent error in the address given by an anonymous reporter, can account for the failure to substantiate. CURRENT TRENDS, *supra*, at 7. Nevertheless, it is true that in the 1981 federal study, a majority of the unsubstantiated cases were determined "invalid" by the caseworker upon a determination that the children had not been abused or neglected. 1981 STUDY FINDINGS, *supra*, at 13.

However, even if the number of reported cases is overstated, the figures on reports to state child protective service agencies clearly underrepresent the known abuse. For example, in 1986, less than half of the cases of abuse and neglect known to professionals made their way to reports of abuse or neglect received by CPS agencies. 1988 STUDY FINDINGS, *supra*, at 6-8 to 6-11.

2. The figure provided is based on 1986 data as described by a comprehensive federal study that collected and analyzed data on the incidence of child abuse nationally. 1988 STUDY FINDINGS, *supra* note 1, at 7-1. This somewhat dated figure is used because no more recent study exhibits the completeness and sophistication of that report.

Other figures from this study give some concreteness to the seriousness of the abuse suffered. In 1986, over 150,000 children were victims of sexual abuse. *Id.* at 3-6. In

as a consequence of such abuse and neglect.³

Beyond these numbers, the horror of the crime itself, as periodically brought to our attention through news reports of acts of almost unimaginable brutality,⁴ and the general helplessness of its victims wrench us emotionally. Its intractability as a social ill and its difficult detection challenge the ability of our institutions to operate effectively. We are taunted by the growing numbers of victims and our inability effectively to prevent the abuse, to punish the perpetrators, and to treat its victims.⁵

The combination of our intense concern about the problem of child abuse and the difficulty in finding a solution makes the area of child abuse one in which legal doctrines are put to their sternest test and new ground is frequently broken. This area is where evidentiary concepts in particular are always challenged, often re-

addition to the fatalities, which numbered 1,100 in that year, 160,000 children suffered serious injuries as a result of abuse or neglect. *Id.* at 3-11.

3. CURRENT TRENDS, *supra* note 1, at 15.

Even this figure on fatalities, which should logically be the most accurate because life-taking abuse should be the most obvious, is subject to some debate. Some experts estimate that the actual number of fatalities, rather than slightly over twelve hundred, ranges from two thousand to five thousand. Murphy et al., *supra* note 1, at 197.

4. The murder of six-year-old Lisa Steinberg in November 1987 by Joel Steinberg, who had been helping to raise her, became a symbol of child abuse in America and the capacity of adults to inflict senseless harm on children in their care. Ronald Sullivan, *Steinberg Given Maximum Term of 8 Years to 25 Years in Child's Death*, N.Y. TIMES, Mar. 25, 1989, at A1; Ronald Sullivan, *Steinberg Is Guilty of First-Degree Manslaughter*, N.Y. TIMES, Jan. 31, 1989, at A1. Jacqueline Bouknicht's apparent murder of her one-year-old son, whom she had earlier abused and who disappeared while in her care, provided another example of this same horror played out in the national spotlight of Supreme Court litigation. Linda Greenhouse, *Supreme Court Roundup: Fifth Amendment Is Pitted Against Child's Welfare in Abuse Case*, N.Y. TIMES, Nov. 8, 1989, at A18; see *Baltimore City Dep't of Social Servs. v. Bouknicht*, 493 U.S. 549, 551-52 (1990) (recounting evidence of early abuse, based on direct observations by medical personnel of mistreatment during hospitalization for a fractured femur and on examinations indicating several other partially healed bone fractures and other signs of severe abuse).

5. Douglas Besharov, an authority on child abuse and a participant in many of the developments in the area of improved reporting and treatment of abuse, has noted that our reaction to the horror stories has driven us almost blindly to take action but that such action has often been misguided, producing often vague and overbroad laws and excessive intervention into family control of children. Douglas J. Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539, 567-79 (1985). He also concludes that one of the consequences of the public reaction to the problem is over-reporting of abuse and neglect that is in part responsible for the large number of unsubstantiated reports, which are sometimes generated by professionals "playing it safe" to avoid being sued or prosecuted. *Id.* at 556-57.

made, and sometimes mangled.⁶ In child abuse cases, new types of expert testimony are received readily,⁷ new uses for old hearsay exceptions are found,⁸ new methods of receiving testimony are developed,⁹ and new approaches to constitutional principles are announced.¹⁰

6. See, e.g., *State v. Myatt*, 697 P.2d 836, 842 (Kan. 1985) (noting that without specific exception for child-victim hearsay, some courts had unreasonably stretched the limits of the excited utterance exception, particularly its requirement that the event and statement must be relatively contemporaneous, thereby threatening to undercut the certainty and integrity of the general hearsay exception).

A number of courts have expressed concern that doctrines designed for use in child abuse prosecutions, if approved, are subject to expansion either into other areas of particular legislative concern or across the board. See *People v. Bastien*, 541 N.E.2d 670, 677 (Ill. 1989) (state conceded at oral argument that if provision permitting *ex parte* videotape statement of child sexual abuse victim were found constitutional, there was no reason why it could not be used for other witnesses); *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 374 & nn.13-14 (Mass. 1988) (rule permitting child witness to testify through electronic means outside presence of defendant held unconstitutional under state constitution in part because court concluded that no principled distinction could be drawn between child witnesses and any other class which the legislature might in the future deem in need of special treatment); see also *People v. Diefenderfer*, 784 P.2d 741, 750 (Colo. 1989) (expressing concern that holding that the potential trauma of testifying by child sexual abuse victim satisfies unavailability requirement might be viewed as opening a broad exception to the normal rule that witnesses ought to testify at trial and that defendants ought not to be convicted by hearsay testimony); *Hall v. State*, 539 So. 2d 1338, 1347 (Miss. 1989) (noting that the social phenomenon of child sexual abuse has seared society's collective consciousness with the result that it demands vigorous prosecution and relaxed rules of admissibility, although court feared consequences and chose to move cautiously because few charges are more difficult to defend).

7. Robert P. Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 85, 112-28 (noting that courts will admit expert testimony that children suffered from sexual abuse and even testimony buttressing credibility of children, although they are much more restrictive in receiving similar testimony regarding adult victims of rape).

8. Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 275-77 (1989) (noting that statements by child identifying specific individual as perpetrator of sexual assault have been admitted under hearsay exception for statement for the purpose of medical diagnosis or treatment based on an extension of the theory considering such identification relevant to treatment).

9. *Maryland v. Craig*, 110 S. Ct. 3157, 3168 (1990) (testimony of child may be given in room separated from the jury and the defendant upon showing that child would suffer trauma from testifying otherwise); see also *Coy v. Iowa*, 487 U.S. 1012, 1024-25 (1988) (O'Connor, J., concurring) (rejecting uniform statutory determination that all child-victims of certain age testify separated from defendant by screen, but suggesting that more particularized determination of harm to child from testifying would pass constitutional muster).

10. *White v. Illinois*, 112 S. Ct. 736 (1992) (holding that, in case involving child sexual abuse, prosecution not required to demonstrate unavailability of declarant under Confrontation Clause where out-of-court statement satisfied well-established hearsay exceptions for spontaneous declarations and statements for medical diagnosis).

Similarly, through mandatory child abuse reporting laws, we are experimenting with the use of attorneys as crime detectors and informants and concomitantly encroaching on the legal protections for attorney-client confidences. The challenges these reporting laws pose to attorney-client confidences are illustrated by an imagined lawyer-client conference:

A domestic relations lawyer meets with a married couple who want to structure their future financial affairs such that monetary issues will be easily settled if the marriage does not last. They confide that although on the whole their relationship is a positive one, they have had problems. In specific, the husband became so angry during one of their disputes some months ago that he struck and injured one of their children who required medical treatment for a broken bone but no hospitalization. The hospital did not view the injury as suspicious. The couple report that they are making progress in repairing their relationship, and believe it will last, but they are not sure.

Depending on the state in which this conversation occurs and the interpretation of concepts analyzed later in this Article, the consultation and much more may effectively terminate at this point.¹¹

Instead of continuing with the discussion of the couple's situation, the lawyer interrupts, informing the couple that in order to avoid her own criminal prosecution, she must report the husband's act of child abuse to state authorities within twenty-four hours. The lawyer advises that she is confident that a formal investigation by child protective services will follow, and warns that criminal charges may ultimately be filed against the husband. She suggests that the husband may want to retain a criminal defense attorney, but warns him that since he has not yet been formally accused of a crime, any incriminating statements he makes to the defense attorney may also be subject to disclosure.¹²

11. In the phrase "much more," I mean to include not only the lawyer-client relationship and the marriage, but also an opportunity to discourage additional physical child abuse.

12. Some readers may have the reaction that this advice cannot possibly be correct: surely the Fifth Amendment would provide constitutional protection for the attorney-client privilege in this context. However, the advice may indeed be sound, and whether the statements would be subject to disclosure depends on the nature of state law regarding the attorney-client privilege, not constitutional principles. See *infra* Section IV(C).

In this scenario, a transformation of the lawyer—from a confidential consultant providing legitimate legal advice to a required reporter of a client's criminal misdeeds—is clearly presented. Whether the operation of child abuse reporting laws will actually significantly alter the traditional protections afforded to confidential attorney-client communications remains to be determined. Certainly the changes in the law that make such a result a possibility began largely through inadvertence and have not yet been vigorously pressed. However, as the hypothetical illustrates, the field of child abuse again provides an opportunity for experimentation, which may affect both the law of evidentiary privilege and of professional ethics. In an era in which the role and value of lawyers is subject to popular attack and the desire to get tough on crime and criminals is the major refrain of politicians and the public alike, the experiment, depending upon one's perspective, either poses clear dangers for traditional protection for client confidences or promises great reform.¹³

Reporting of child abuse by lawyers involves the interaction of three types of legal rules. First, statutes have been enacted in twenty-two states that require attorney reporting of child abuse.¹⁴ Typically, these statutes establish mandatory duties to report known or suspected child abuse and are applicable to the entire public, including lawyers—only a few statutes specifically identify attorneys as a professional group required to report abuse. The reporting duties are enforced by criminal penalties and supplemented by immunity from civil suit for the act of reporting suspected abuse.¹⁵

Second, the attorney-client privilege, which excludes from evidence statements made by an individual in confidence to an attorney for the purpose of obtaining legal advice,¹⁶ potentially

13. In reality, however, the effects of the experiment are not so clear-cut. The double-edge quality of many of the issues raised by these cases makes them particularly difficult from both an emotional and a legal perspective. For example, on the one hand, reporting of the couple's revelation may damage potentially valuable relationships. On the other, the lawyer may have learned only of the tip of the iceberg, and her disclosure may prevent terrible future damage to the couple's children.

14. These statutes are discussed *infra* in subsection I(B)(1).

15. LUCY A. YOUNES, U.S. DEPT OF HEALTH & HUMAN SERVICES, STATE CHILD ABUSE AND NEGLECT LAWS: A COMPARATIVE ANALYSIS, 1985, at 17-20 (1987).

16. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (rev. ed. 1961).

conflicts with the reporting requirements as applied to lawyers. The interaction between the attorney-client privilege and reporting laws is, however, uncertain. The reporting laws may have the intent or the effect of abrogating the attorney-client privilege and therefore mandate that attorneys report information about their clients' abusive conduct even when gained through conversations that would normally be protected by the privilege. Although I argue against such an interpretation, abrogation of the privilege would appear to be the reasonable interpretation of the statutory language in some states. A fundamental change of this type in the scope of the attorney-client privilege raises questions about the extent to which the privilege has a constitutional basis and whether it can be radically modified by simple legislative action.

Third, rules of professional responsibility also may conflict with mandatory reporting requirements. These ethics rules mandate that an attorney, on pain of professional discipline, protect the confidences and secrets of her client.¹⁷ Nevertheless, lawyers may be required or permitted to report child abuse under two major exceptions to these ethics rules. Lawyers are permitted to reveal confidential information when "required by law" to do so, and the child abuse reporting statutes may constitute such a superseding legal duty automatically permitting disclosure. In addition, because it constitutes a crime often likely to be repeated, information about past child abuse may be subject to disclosure under another exception to confidentiality rules that permits or requires attorneys to reveal their clients' intention to commit a future crime.

A classic statement of the basic elements of the privilege is contained in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59; see also REV. UNIF. R. EVID. 502 (1986).

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1982) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) & cmt. at 22 (1989) [hereinafter MODEL RULES]. States have enacted various versions of these models to govern the protection and disclosure of confidential information by attorneys. See *infra* note 128.

Determining whether disclosure is required or permitted entails examination of the dimensions of the reporting laws, the attorney-client privilege, and attorney disciplinary rules. This Article moves progressively from the analysis of specific, somewhat mundane issues, such as statutory construction, to the basic justification for protecting confidences in this area and the options for legislative reform of the attorney-client privilege. It begins by applying currently accepted doctrine to issues of child abuse reporting, but concludes with an examination of the justifications for the doctrines themselves. Thus, readers who proceed from a fundamental skepticism of the value of protecting attorney-client confidences may be frustrated by an initial apparent acceptance of what some view as little more than professional protectionism and may wish to skip to Parts IV and V for a more critical analysis.

In Part I, I develop the history of reporting statutes in the United States and then detail the specific statutes that require attorney reporting of abuse, paying particular attention to the treatment of the attorney-client privilege in the states in which these statutes have been enacted. I reach the overall conclusion that the statutes do not exhibit an intent to abrogate the attorney-client privilege. However, they rarely spell out how that privilege should apply, if at all, to out-of-court reporting requirements, an issue left in doubt by the traditional definition of the attorney-client privilege.

In Part II, I examine the scope of the attorney-client privilege as it relates to such out-of-court disclosures. My conclusion is that the attorney-client privilege, interpreted in light of its history and policies, should be construed to prevent disclosures under current reporting laws when the reports are based on confidential communications made for the purpose of receiving legal advice.

In Part III, I analyze numerous challenges to the ethical principle of confidentiality that arise when an attorney receives information regarding child abuse. I conclude that in most instances disclosure is not authorized under the "required by law" exception to these rules of professional ethics, but that disclosure will more frequently be authorized under the exception for a client's intention to commit a future crime. Unfortunately, the determination of when disclosure is permitted under the "future crimes" exception remains a fact-bound and delicate inquiry, and I argue that broad use of this exception is fraught with dangers of (or opportunities for) expansion into other types of predictably repetitive crime.

The fact that legislatures did not intend to abrogate the attorney-client privilege through existing child abuse reporting statutes does not mean that legislation may not explicitly pursue such a purpose in the future. In Part IV, I examine the question of the proper scope of the attorney-client privilege given the legislative purposes revealed by most of the reporting statutes. I conclude that the policy determinations evident in the abrogation of evidentiary privileges for professionals other than attorneys are fatal to the argument that the privilege should be maintained so that lawyers can learn of and discourage future illegal conduct. Furthermore, the Constitution provides only *very* limited protection for the attorney-client privilege and leaves the definition of the privilege to be largely a matter of legislative choice and policy judgment.

In Part V, I set out suggestions for clarification of problematic aspects of current statutes, providing three alternatives for statutory revision of the attorney-client privilege as it relates to child abuse reporting requirements. These three versions of the privilege vary according to policy judgments about the value of, and appropriate purposes for, the attorney-client privilege. Finally, I examine some of the implications of current developments in the role of the attorney as a reporter of crime that are emerging from this emotionally charged area of child abuse. Indeed, how we resolve the issues regarding the attorney-client confidentiality may have as much to do with our determination of how we feel about the growing regulation of our lives through use of criminal sanctions as it does with doctrinal analysis of rules governing lawyer-client confidentiality. I argue that the game is not worth the candle: The minimal benefits to the cause of protecting children is outweighed by the damage to doctrines historically important in protecting individual autonomy, particularly by the dangers inherent in approving threatened criminal sanctions as a means of transforming lawyers into mandatory reporters of crime.

I. THE REPORTING REQUIREMENTS

A. *Historical Overview*

Following a period of innovative medical research and effective publicity on the problem of child abuse,¹⁸ states began in the

18. Allan H. McCoid, *The Battered Child and Other Assaults upon the Family: Part*

early 1960s to enact statutes requiring the reporting of child abuse. Although some statutes were independently developed,¹⁹ most were inspired by national efforts and influenced by model legislation. In 1963, the Children's Bureau of the Department of Health, Education, and Welfare drafted the first model reporting statute.²⁰ Proposals by the American Medical Association and the Council of State Governments soon followed.²¹ By 1967, every state had adopted some form of reporting legislation.²²

Although varying somewhat in detail, the initial versions of these statutes subjected only physicians to mandatory reporting requirements.²³ The early reporting statutes also expressly abrogated the physician-patient privilege along with, in most instances, the husband-wife privilege.²⁴

Reporting laws quickly expanded beyond physicians and medical personnel to include others under their mandatory reporting requirements. They followed two basic patterns, although often the two were combined.²⁵ Some statutes listed as mandatory reporters

One, 50 MINN. L. REV. 1, 3-19 (1965) (discussing the development of the medical literature on the subject of child abuse and the efforts of the medical profession to focus public concern on the problem).

19. *Id.* at 21-26.

20. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD (1963).

The same year, the American Humane Association published guidelines for legislation. CHILDREN'S DIVISION, AMERICAN HUMANE ASS'N, GUIDELINES FOR LEGISLATION TO PROTECT THE BATTERED CHILD (1963).

21. AMERICAN MEDICAL ASS'N, PHYSICAL ABUSE OF CHILDREN—SUGGESTED LEGISLATION (1965); COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION (1965).

22. See Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 466 (1978); Brian G. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI-KENT L. REV. 641, 649-50 (1978); Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 142 (1986); Mary H. Mitchell, *Must Clergy Tell?: Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 726-27 (1987).

23. Besharov, *supra* note 22, at 466-67.

24. Mitchell, *supra* note 22, at 726-27; CHILDREN'S DIVISION, AMERICAN HUMANE ASS'N, CHILD ABUSE LEGISLATION: ANALYSIS OF REPORTING LAWS IN THE UNITED STATES 31 (1966) (reporting that in 1966, a number of states followed a model that both focused exclusively on doctors and appeared to abrogate only the doctor-patient privilege).

25. Almost any effort to trace a national trend in legislation overly simplifies the

a wide range of specifically identified professionals, such as teachers, social workers, and law enforcement personnel, who along with physicians were likely to have early contact with abused children.²⁶ Other statutes used a catchall provision that required reporting by "any person" or "any other person" added to a more limited list of designated reporters.²⁷ Under both types of statutes, if a person required by the statute to report abuse failed to do so promptly, that failure constituted a criminal violation, typically a misdemeanor.²⁸

Another round of statutory developments and refinement of reporting requirements was prompted in the mid-1970s by the enactment of the federal Child Abuse Prevention and Treatment Act of 1974.²⁹ That act encouraged states to improve their child

process. In actuality, the pattern in any state is likely to be complicated, with changes in the law produced by multiple influences. For instance, by 1986 California had amended its reporting statute fifteen times. Meriwether, *supra* note 22, at 142-43. In some states, the course of reform is even documented by law review analysis. See, e.g., Michael R. Chamberlain & Gerald M. Eaton, *Protecting the Abused and Neglected Child*, 19 N.H. B.J. 25 (1977); Walter E. Forehand, *Are New Procedures Correction Enough for Florida's Child Abuse Registry Statute?*, 18 FLA. ST. U.L. REV. 371 (1991); Kathryn M. Krause, *Child Abuse and Neglect Reporting Legislation in Missouri*, 42 MO. L. REV. 207 (1977).

26. The trend to include additional professional groups has continued with new ones added to statutes each year. DOUGLAS J. BESHAROV, *RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED* 23 (1990).

27. Besharov, *supra* note 22, at 467-69; Fraser, *supra* note 22, at 656-58.

The first major group to advocate requiring universal reporting was the American Humane Association. In 1966, it recommended that, to assure protection to the maximum number of children and for reasons of simplicity, states should revise their statutes to mandate "that any person having knowledge of child abuse is required to report." CHILDREN'S DIVISION, *supra* note 24, at 17. But see Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 713 (1966) (arguing that reporting requirement should be placed solely on doctors, who have the skill to detect difficult cases, and contending that if the reporting group is large the sense of duty may become weak). See generally Alan Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L.Q. 245, 271-76 (1974) (discussing the debate about the appropriate breadth of reporting laws).

In 1966, only three of forty-seven states with reporting statutes had mandatory provisions applicable to all citizens. CHILDREN'S DIVISION, *supra* note 24, at 16. A decade later, the picture had changed dramatically, with roughly twenty states having such laws. Besharov, *supra* note 22, at 469.

28. YOUNES, *supra* note 15, at 17. In 1985, all but four states punished failure to report by mandatory reporters as a misdemeanor. *Id.*; see, e.g., IDAHO CODE § 16-1619(b) (Supp. 1991); R.I. GEN. LAWS § 40-11-6.1 (1990).

29. Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. §§ 5101-5107 (1988 & Supp. II 1990)).

abuse reporting and treatment systems by offering grants to state programs meeting the new federal standards.³⁰

A new model reporting statute, which provided a blueprint for satisfying federal requirements, was quickly released.³¹ The model statute followed the pattern of specifically identifying professionals required to report abuse, a list that did not include lawyers. The statute also proposed abrogation of the husband-wife privilege and all privileges between any professional person and her patient or client, except, notably, the attorney-client privilege.³² Within the span of a few years, all but a handful of states had revamped their laws to meet the new federal requirements.³³

The history of the enactment of reporting laws thus demonstrates that lawyers, although perhaps not totally ignored,³⁴ were not a prime target of the mandatory reporting requirements. Even more clearly, the attorney-client privilege was neither marked for

30. JOSEPH J. COSTA & GORDON K. NELSON, CHILD ABUSE AND NEGLECT: LEGISLATION, REPORTING, AND PREVENTION 17, 19-20 (1978); Besharov, *supra* note 5, at 542-43; Mitchell, *supra* note 22, at 727 n.19.

31. CHILD ABUSE & NEGLECT PROJECT, EDUCATION COMM'N OF THE STATES, REPORT NO. 71, CHILD ABUSE AND NEGLECT: MODEL LEGISLATION FOR THE STATES (1975). This model act was drafted by Brian Fraser and Douglas Besharov, two leading advocates and scholars in the field. *Id.* at 1.

32. The language of the model statute on this point is as follows:

Such privileged communications, *excluding those of attorney and client*, shall not constitute grounds for failure to report as required or permitted by this Act, to cooperate with the child protective service in its activities pursuant to this Act, or to give or accept evidence in any judicial proceeding relating to child abuse, sexual abuse or neglect.

Id. at 30 (emphasis added). This provision clearly preserves the attorney-client privilege, although the commentary gives no indication why the attorney-client privilege is preserved. *Id.*

Another model act drafted two years later, which contains an almost identical provision regarding abrogation of privileges, provides some insight. NATIONAL CENTER ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, MODEL CHILD PROTECTION ACT WITH COMMENTARY 31 (draft Aug. 1977) [hereinafter MODEL CHILD PROTECTION ACT]. Its commentary gives two reasons for preserving the attorney-client privilege: first, abrogation of the attorney-client privilege would be unnecessary because by the time the case reaches court the child should have been protected and sufficient evidence obtained; and second, abrogation would probably be unconstitutional as violative of the right to confidences necessary to a fair trial. *Id.* at 32.

33. Besharov, *supra* note 5, at 543-44.

34. The American Medical Association called for reporting by lawyers, albeit on a voluntary basis, in the mid-1960s. See Editorial, *Battered Child Legislation*, J.A.M.A., Apr. 27, 1964, at 136; Annual Report, J.A.M.A., Oct. 25, 1965, at 139, 172.

abrogation by any of the model legislation³⁵ nor viewed as an important impediment to effective detection of abuse.

The detailed examination of current statutes that follows demonstrates little, if any, intent to abrogate the attorney-client privilege. Indeed, in the vast majority of the statutes, lawyers are covered only under the general duty applying to all citizens. Moreover, although the continued viability of the attorney-client privilege is not always stated and any protection afforded by the privilege against required reporting is rarely specified, the attorney-client privilege is virtually nowhere affirmatively abrogated by these statutes.

Thus, the impact of reporting laws on the protections afforded to attorney-client confidences was apparently either entirely unintended by the drafters of the legislation or at most a byproduct of a more general attempt to expand broadly the scope of reporting requirements to have the maximum impact upon the problem of child abuse. Nevertheless, the reporting duties on attorneys are real and the effect on attorney-client confidences potentially very significant.

35. The major model acts either expressly preserved the attorney-client privilege or omitted it from the list of privileges to be abrogated. The 1963 model act proffered by the Children's Bureau stated with regard to privileges: "Neither the physician-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding a child's injuries or the cause thereof, in any judicial proceeding resulting from a report pursuant to this Act." CHILDREN'S BUREAU, *supra* note 20, at 12-13. The American Humane Association guidelines were even narrower, focusing only on eliminating the physician-patient privilege. CHILDREN'S DIVISION, *supra* note 20, at 6-7. The provisions of two second-generation models, which specifically preserve the attorney-client privilege, are discussed in note 32 *supra*.

Only the Council of State Governments model act of 1965, which required reporting exclusively by medical personnel, contained language that could possibly be construed to call for abrogation of the attorney-client privilege. Its provision regarding privileges reads as follows:

In any proceeding resulting from a report made pursuant to this act or in any proceeding where such a report or any contents thereof are sought to be introduced in evidence, such report or contents or any other fact or facts related thereto or to the condition of the child who is the subject of the report shall not be excluded on the ground that the matter is or may be the subject of a physician-patient privilege or similar privilege or rule against disclosure.

COUNCIL OF STATE GOVERNMENTS, *supra* note 21, at 68 (emphasis added).

The American Medical Association model differed from the others in calling only for voluntary reporting by all reporters. Annual Report, *supra* note 34, at 172.

B. *The Individual Statutes*

1. *Reporting Requirements.* In addition to mandating reporting of abuse by certain individuals, child abuse reporting statutes typically permit anyone to report child abuse.³⁶ As to both mandatory and voluntary reporters, the statutes provide immunity from suit for the act of reporting suspected abuse.³⁷ Although an important source of information about abuse, voluntary reporting by lawyers has no impact on the attorney-client privilege or ethics rules requiring the protection of confidential conversations.³⁸ As a result, I concentrate exclusively on statutes that include lawyers among mandatory reporters.³⁹

36. YOUNES, *supra* note 15, at 17. Thirty-six states had such permissive provisions in 1985. *Id.*; see, e.g., ARIZ. REV. STAT. ANN. § 13-3620(B) (1989); COLO. REV. STAT. § 19-10-104(3) (1986).

37. See, e.g., DEL. CODE ANN. tit. 16, § 906 (1983); KY. REV. STAT. ANN. § 620.030(1) (Baldwin Supp. 1991). However, in some states the immunity provided to mandatory reporters may be broader than that accorded to voluntary reporters, as is the case in California. See *Krikorian v. Barry*, 242 Cal. Rptr. 312 (Ct. App. 1987) (immunity absolute for mandatory reporters but not for voluntary reporters). Vermont and Massachusetts also treat permissive reporters differently. YOUNES, *supra* note 15, at 18-19.

38. Other principles, such as the authorization afforded to a lawyer to reveal information that a client intends to commit a future crime, may override the confidentiality requirement in the ethics rules. However, permissive reporting provisions neither expand nor contract any protections otherwise afforded to confidential communications.

One possible exception to the principle that permissive provisions have no impact on reporting duties of lawyers may be found in the Wisconsin statute. That statute specifically states that "[a]ny other person, *including an attorney*, having reason to suspect that a child has been abused or neglected . . . may make . . . such a report." WIS. STAT. ANN. § 48.981(2)(a) (West 1987 & Supp. 1991) (emphasis added). The statute, which itself contains no provisions abrogating any privileges, does not explain what impact this permissive provision is intended to have on the attorney-client privilege. WIS. STAT. ANN. § 905.03 (West 1975 & Supp. 1991). The attorney-client privilege statute itself provides no exception for child abuse, *id.*, in contrast to the physician-patient privilege, which excludes examinations of abused or injured children from the privilege, WIS. STAT. ANN. § 905.04(4)(e) (West 1975 & Supp. 1991). Moreover, the Wisconsin Rules of Professional Conduct for Attorneys provide no exception to the requirement of confidentiality for disclosures "required by law." WIS. SUP. CT. R. 20:1.6. (West 1988).

The impact of the Wisconsin reporting provision on privileges is uncertain. Given that the statute explicitly mentions attorneys, however, it is hard to be confident that the intent and/or effect is not to authorize disclosure in spite of the attorney-client privilege and ethics rules requiring confidentiality.

39. The same statutory patterns regarding the treatment of the attorney-client privilege that appear in mandatory reporting statutes are replicated in statutes in which reporting is permissive. See, e.g., ALA. CODE § 26-14-10 (1986) ("The doctrine of privileged communication, with the exception of the attorney-client privilege, shall not be ground for excluding any evidence . . . in any judicial proceeding . . ."); COLO. REV. STAT. § 19-10-112 (1986) ("The privileged communication between patient and physician,

Currently, twenty-two states have mandatory reporting systems applicable specifically or generally to lawyers: Connecticut, Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, and Wyoming.⁴⁰ Of those, only four states—Mississippi, Nevada, Ohio, and Oregon—have statutes that specifically mention lawyers as a group subject to reporting requirements. The other states have statutes that include lawyers generally through language that imposes the duty on “any person” (e.g., Texas, Rhode Island, Wyoming), or “any person, including but not limited to” (e.g., Florida, Tennessee, Utah), or “any other person” (e.g., Delaware, New Hampshire). In these eighteen states, the reporting requirement—typically threatening criminal sanctions for failure promptly to report abuse—constitutes, despite its generality, a very real duty for lawyers.⁴¹

between patient and registered professional nurse, and between husband and wife shall not be a ground for excluding evidence in any judicial proceeding”); MICH. COMP. LAWS ANN. § 722.631 (West 1991) (“Any legally recognized privileged communication except that between attorney and client is abrogated and shall neither constitute grounds for excusing a report otherwise required to be made nor for excluding evidence in a civil child protective proceeding”).

The similarity in treatment of the attorney-client privilege between permissive and mandatory reporting schemes suggests that the provisions in mandatory reporting statutes do not contemplate eliminating protections for privileged conversations, as permissive statutes clearly do not intend to require reporting by attorneys.

40. CONN. GEN. STAT. ANN. § 17a-103 (West Supp. 1991); DEL. CODE ANN. tit. 16, § 903 (1983); FLA. STAT. ANN. § 415.504(1) (West 1986 & Supp. 1992); IDAHO CODE § 16-1619 (Supp. 1991); IND. CODE ANN. § 31-6-11-3(a) (Burns 1987); KY. REV. STAT. ANN. § 620.030(2) (Baldwin Supp. 1991); MD. CODE ANN., FAM. LAW § 5-705(a)(1) (1991); MISS. CODE ANN. § 43-21-353 (Supp. 1990); NEB. REV. STAT. § 28-711(1) (1989); NEV. REV. STAT. ANN. § 432B.220(2)(i) (Michie 1991); N.H. REV. STAT. ANN. § 169-C:39 (1990); N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991); N.M. STAT. ANN. § 32-1-15(A) (Michie 1989); N.C. GEN. STAT. § 7A-543 (1989); OHIO REV. CODE ANN. § 2151.421(A)(1) (Baldwin 1987); OKLA. STAT. ANN. tit. 21, § 846(A) (West Supp. 1992); OR. REV. STAT. §§ 418.740(3)(m) (Supp. 1990), 418.750 (1985); R.I. GEN. LAWS § 40-11-3 (1990); TENN. CODE ANN. § 37-1-403 (1991); TEX. FAM. CODE ANN. § 34.01 (West Supp. 1992); UTAH CODE ANN. § 62A-4-503(1) (1989); WYO. STAT. § 14-3-205(a) (1986).

I have attempted to be complete in this listing, and I believe that none of the other states require reporting by lawyers. The analysis that follows represents an effort to canvass the set of issues raised by these statutes. Countrywide statutory analysis has its difficulties, and oversights are possible.

41. To date, an attorney has not been prosecuted for failure to report abuse in a published case. Until recently, prosecution of professionals generally for failure to report was rare. However, the numbers of prosecutions are now increasing, with the list of

2. *Treatment of Attorney-Client Privilege.* Two questions must be answered to determine how reporting statutes affect confidential attorney-client communications. The first is whether the reporting statutes abrogate or preserve the traditional evidentiary privilege. The second is whether the attorney-client privilege, if not abrogated by reporting laws, applies only in judicial proceedings or extends to otherwise required out-of-court revelations, such as the reporting of suspected abuse to law enforcement officials or social service authorities. With these two issues in mind, the statutes may be divided into several groups.

In the first group are the statutes in seven states that explicitly address the issue whether statements within the attorney-client privilege are excluded as a basis for knowledge of abuse that can trigger reporting requirements.⁴² The statutes in four of these states⁴³ not only preserve the attorney-client privilege, but also specifically exempt from the reporting requirement any knowledge of abuse the lawyer gains through conversations that would be covered by the privilege if the lawyer were called to testify in judicial proceedings.⁴⁴ In contrast, the statutes in the other three

professionals who have been the subject of criminal action growing. BESHAROV, *supra* note 26, at 37-39 (detailing this trend).

42. In this group, as one might imagine, are the four states, Mississippi, Nevada, Ohio, and Oregon, that specifically single out attorneys as mandatory reporters. See *supra* text following note 40. In addition, Maryland, New Mexico, and Oklahoma, three of the states that require attorneys along with other citizens to report abuse, apparently speak directly to interaction between the privilege and the reporting requirements.

43. These states are: Maryland, which includes attorneys along with all other citizens as mandatory reporters, and Nevada, Ohio, and Oregon, which impose reporting duties specifically upon attorneys.

44. The relevant portions of these statutes are given below:

Maryland (MD. FAM. LAW CODE ANN. § 5-705(a)(2) (1991)): A person is not required to provide notice under paragraph (1) of this subsection:

(i) in violation of the privilege described under § 9-108 [attorney-client privilege] of the Courts Article;

(ii) if notice would disclose matter communicated in confidence by a client to the client's attorney or other information relating to the representation of the client; or

(iii) in violation of any constitutional right to assistance of counsel.

Nevada (NEV. REV. STAT. ANN. § 432B.220(2) (Michie 1991) (emphasis added)): Reports must be made by the following persons who, in their professional or occupational capacities, know or have reason to believe that a child has been abused or neglected:

....
(i) An attorney, unless he has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.

states appear to abrogate the privilege. In Mississippi, the reporting statute declares that "reporting of an abused or neglected child shall not constitute a breach of confidentiality";⁴⁵ in New Mexico and Oklahoma, it abrogates the "physician-patient privilege or similar privilege or rule against disclosure."⁴⁶ However, whether abrogation is intended in any of these three states becomes questionable on closer inspection.⁴⁷

Ohio (OHIO REV. CODE ANN. § 2151.421(A)(2) (Baldwin 1987) (emphasis added)): *An attorney is not required to make a report pursuant to division (A)(1) of this section concerning any communication made to him by one of his clients in the attorney-client relationship, if, in accordance with division (A) of section 2317.02 of the Revised Code, the attorney could not testify with respect to that communication in a civil or criminal proceeding, except that the client is deemed to have waived any testimonial privilege . . . with respect to that communication and the attorney shall make a report . . . , if [the client is a minor and appears to have been the victim of abuse].*

Oregon (OR. REV. STAT. § 418.750 (1985) (emphasis added)): *Nothing contained in ORS 40.225 to 40.295 [evidentiary privileges] shall affect the duty to report imposed by this section, except that a psychiatrist, psychologist, clergyman or attorney shall not be required to report such information communicated by a person if the communication is privileged under ORS 40.225-40.295.*

45. MISS. CODE ANN. § 43-23-9 (1972).

46. N.M. STAT. ANN. § 32-1-16(A) (Michie 1989); OKLA. STAT. ANN. tit. 21, § 848 (West Supp. 1992).

47. In Mississippi, another provision of the reporting statute appears to limit disclosure to information acquired outside the scope of the traditional privilege by restricting the reporting duties of attorneys to circumstances where, under traditional analysis, the privilege would be found inapplicable. The effect of the statutes appears to be that a report by an attorney is required only when based on "knowledge through observation," MISS. CODE ANN. § 43-21-353 (Supp. 1990), as opposed to knowledge through confidential conversation. Observations, as contrasted to communications, are typically not treated as information protected by the attorney-client privilege, although in some circumstances the conduct accompanying the observation may be sufficiently communicative to bring the entire transaction within the privilege. See 1 MCCORMICK ON EVIDENCE § 89, at 125-26 (John W. Strong gen. ed., 4th ed. 1992) (client rolling up sleeve to reveal a hidden scar or opening a drawer to display a weapon treated as protected communication rather than unprotected observation). Unfortunately, however, no judicial opinion has construed the Mississippi statutory structure.

In New Mexico and Oklahoma, the statutory language, which abrogates the "physician-patient privilege or similar privilege," should likely not be construed to include the attorney-client privilege. Given the general development of reporting statutes from early models that covered only doctors or focused on them most directly, the language is both understandable and unrelated to the attorney-client privilege. In fact, this language on abrogation of privilege is taken directly from the Council of State Governments model act that required reporting *only* by medical personnel. COUNCIL OF STATE GOVERNMENTS, *supra* note 21, at 67; for text of provision, see *supra* note 35. Moreover, a contemporary analysis of the model act's language contained no hint that it was intended to apply to attorney-client privilege. CHILDREN'S DIVISION, *supra* note 24, at 31 (noting that it might be argued that "or similar privilege" applied to husband-wife privilege, which was frequently abrogated by statutes in other states but that if strictly interpreted would

Statutes in a second group of five states⁴⁸ explicitly abrogate certain privileges yet retain others, including the attorney-client privilege, and these statutes thus unmistakably preserve the traditional evidentiary privilege. These statutes also state that when *abrogating* privileges they intend to cover *both* the evidentiary use of confidential information in judicial proceedings and the duty to report.⁴⁹ Whether the statutes positively exempt confidences protected by the attorney-client privilege from reporting requirements depends upon whether they intend to accomplish both their affirmatively stated purpose when they abrogate privileges and their inverse when they preserve them: Since the statutes when eliminating privileges explicitly do so for both reporting and testimony, do they likewise intend that those privileges explicitly preserved shield against required reporting as well as testimony? Although an argument may be made for this broad interpretation of the statutory language preserving the attorney-client privilege, its merit is hardly compelling.

A third group of seven states abrogates some privileges but retains others, including the attorney-client privilege.⁵⁰ In contrast

apply only to similar medical privileges, such as nurse-patient). *But see* Besharov, *supra* note 22, at 478 & n.124 (listing New Mexico and Oklahoma as states that by this legislation apparently abrogated the attorney-client privilege).

However, standard legislative intent analysis, which often begins and ends with the literal language of an apparently unambiguous statute, might conclude that the attorney-client privilege was eliminated since its operation is similar to the physician-patient privilege. In New Mexico and Oklahoma, like Mississippi, the statutory structure has not received judicial interpretation.

48. In this group are Florida, Kentucky, New Hampshire, Rhode Island, and, with a small variation, Indiana. *See infra* note 49.

49. FLA. STAT. ANN. § 415.512 (West 1986); KY. REV. STAT. ANN. § 620.050(2) (Baldwin Supp. 1991); N.H. REV. STAT. ANN. § 169-C:32 (1990); R.I. GEN. LAWS § 40-11-11 (1990).

The treatment of privileges under these statutes follows two second-generation model acts that were developed in the mid-1970s. *See supra* note 32. The Rhode Island provision is typical of the group:

The privileged quality of communication between husband and wife and any professional person and his or her patient or client, *except that between attorney and client*, is hereby abrogated in situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required by this chapter, failure to cooperate with the department in its activities pursuant to this chapter, or failure to give or accept evidence in any judicial proceeding relating to child abuse or neglect.

R.I. GEN. LAWS § 40-11-11 (1990) (emphasis added).

The statutory pattern in Indiana differs in that, while not explicitly preserving the attorney-client privilege, it specifically abrogates several other privileges as to both reporting and testifying. IND. CODE ANN. § 31-6-11-8 (Burns 1987).

50. Four states, Delaware, Idaho, Texas, and Wyoming, fit this pattern perfectly. The

to the second group described above, these statutes abrogate the other privileges only with regard to the receiving of evidence in judicial proceedings.⁵¹ Thus, in these states, the attorney-client evidentiary privilege is preserved, but the statutes do not indicate whether that privilege should at all constrain the operation of reporting requirements.

The final group of three states⁵² cannot be categorized. In these, the intent of the reporting statutes is so murky that nothing can confidently be said regarding the preservation or abrogation of the attorney-client privilege as applied to either in-court or out-of-court disclosures.⁵³

other three, Nebraska, North Carolina, and Tennessee, preserve privileges only by implication. In these three states, the attorney-client privilege is omitted from a specific listing of other privileges that are abrogated. Under the general principle of statutory interpretation *expressio unius est exclusio alterius*, these omitted privileges are preserved. See 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (Singer 5th ed. 1992).

51. These seven states can usefully be divided into two subgroups. See *supra* note 50. In the first are Delaware, Idaho, Texas, and Wyoming. DEL. CODE ANN. tit. 16, § 908 (1983); IDAHO CODE § 16-1620 (Supp. 1991); TEX. FAM. CODE ANN. § 34.04 (West 1986); WYO. STAT. § 14-3-210 (1986).

The Delaware statute is typical of this first subgroup:

The physician-patient privilege, husband-wife privilege or any privilege *except the attorney-client privilege*, provided for by professions such as social work or nursing, covered by law or a code of ethics regarding practitioner-client confidences, both as they relate to the competency of the witness and to the exclusion of evidence, shall not pertain in any civil or criminal litigation in which a person's neglect, abuse, dependency, exploitation or abandonment is in issue nor in any judicial proceeding resulting from a report submitted pursuant to this chapter.

DEL. CODE ANN. tit. 16, § 908 (1983) (emphasis added).

The second subgroup consists of Nebraska, North Carolina, and Tennessee. NEB. REV. STAT. § 28-714 (1989); N.C. GEN. STAT. § 7A-551 (1989); TENN. CODE ANN. § 37-1-411 (1991).

The North Carolina statute is typical of the second subgroup:

Neither the physician-patient privilege, the psychologist-client privilege, nor the husband-wife privilege shall be grounds for excluding evidence of abuse or neglect in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse or neglect is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as said privileges relate to the competency of the witness and to the exclusion of confidential communications.

N.C. GEN. STAT. § 7A-551 (1989).

52. These states include Connecticut, New Jersey, and Utah. See *infra* note 53.

53. Connecticut and New Jersey child abuse reporting statutes contain no explicit basis for either the abrogation or the preservation of any privilege. The law concerning the attorney-client privilege is equally silent. In Connecticut, the privilege is governed by common law. *Bersani v. Bersani*, 565 A.2d 1368, 1370 (Conn. Super. Ct. 1989). In New Jersey, the privilege is defined by statute, N.J. STAT. ANN. § 2A:84A-20 (West 1976), which is a basic statement of the privilege as developed at common law without a special provision applicable to child abuse cases.

C. Preliminary Conclusions Regarding Impact of Reporting

The reporting statutes in many of these twenty-two states raise a number of issues and problems. The first level of concern is one of simple statutory intent. What did these statutes mean to accomplish with regard to the reporting of child abuse by attorneys?

1. *A Reporting Requirement Applicable to Lawyers.* One conclusion is indisputable. These statutes intended that lawyers be required to report child abuse. In their modern formulation, reporting requirements have a uniformly broad focus that extends beyond the medical profession. In a handful of states, lawyers as a profession are specifically identified as having a duty to report, and in a larger number, they are treated as all other citizens. Lawyers in all of these states receive no blanket exemption from the commands of the law and thus are required to report abuse in some instances.⁵⁴ The issue in many states is whether that respon-

Several different interpretations are possible. One plausible argument is that in the absence of an expressed intent otherwise, an important legal principle like the attorney-client privilege should be presumed to continue. Alternatively, the clear command of the reporting statutes may be held to apply and abrogate the privilege if the reporting provisions were enacted more recently than the privilege. Besharov, *supra* note 22, at 477.

Utah's statutory structure presents an unusual case. Its statute specifically exempts from the reporting requirement information received by the clergy during confession, UTAH CODE ANN. § 62A-4-503(2), (3) (1989), and it abrogates doctor-patient privilege, although mentioning only abrogation with regard to testimony, *id.* § 62A-4-513(4). Despite this specific treatment of other professional privileges, the statute is silent with respect to the attorney-client privilege. The statutory silence is ambiguous. On the one hand, silence might be interpreted to mean that the attorney-client privilege is preserved given its omission from the list of privileges to be abrogated. *See supra* note 50. On the other hand, since the clergyman-penitent privilege is specifically preserved, silence regarding the attorney-client privilege also means it has been omitted as well from a list of retained privileges, possibly signifying an intent to abrogate.

A peculiar legislative history with regard to the clergyman-penitent privilege explains its inclusion in the statute, but hardly resolves the problem of interpreting the statute's silence on the attorney-client privilege. In 1983, the Attorney General of Utah issued an opinion that the then-existing clergyman-penitent privilege did not apply outside judicial proceedings and provided no protection against required reporting of child abuse. Op. Utah Att'y Gen. No. 82-87 (Feb. 17, 1983). The opinion stated that the situation could be corrected only by legislative action. *Id.* The legislature subsequently amended the law to exempt the clergy from reporting requirements where the information is obtained through a confession of the perpetrator but to require reporting if the information is obtained otherwise. UTAH CODE ANN. § 62A-4-503(2), (3) (1989).

54. The breadth of reporting duties can be breathtaking. For example, in *Gross v. Myers*, 748 P.2d 459 (Mont. 1987), the Supreme Court of Montana in the context of civil litigation affirmed the judgment of the trial court that a social worker was subject to the

sibility is limited by traditional protections of the attorney-client privilege when information regarding abuse was obtained in the course of legal representation of a client.

2. *Preservation or Abrogation of Attorney-Client Privilege.* A second conclusion is generally, although not perhaps universally, valid. Most reporting statutes exhibit no intent to abrogate the attorney-client privilege. Thirteen states by explicit statement⁵⁵ and three more by implication⁵⁶ preserve the attorney-client privilege in connection with the reporting of child abuse and/or litigation of child abuse cases. In the remaining six states, with the possible exception of Mississippi, it is hard to find any evidence of an intention to abrogate the attorney-client privilege.

Given the particular history of this type of legislation, which demonstrates no substantial voice for abrogating the attorney-client privilege, the silence of some statutes regarding preservation of the privilege should not be read implicitly as rejecting it. Indeed, in this historical context, even the overbroad language in the New Mexico and Oklahoma statutes apparently abrogating all privileges⁵⁷ should not be read as eliminating the attorney-client privilege.

Several notes of caution are in order, however. Legal history is filled with important legislative developments that were not explicitly intended,⁵⁸ and in accordance with basic principles of legislative interpretation, courts will generally ignore an intent not reflected by the words of a statute.⁵⁹ In particular, courts in New

reporting mandate of the law. The information involved sexual abuse that had occurred sixteen years earlier, which might indicate a present threat of harm because the perpetrator might now victimize his grandchildren. *Id.* at 460-62.

55. Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, New Hampshire, Ohio, Oregon, Nevada, Rhode Island, Texas, and Wyoming. *See supra* notes 44, 49, 51.

56. These three states are Nebraska, North Carolina, and Tennessee. *See supra* notes 50-51.

57. *See supra* note 46 and accompanying text.

58. Even within the limited area of compelled disclosures from attorneys, an example of such apparently unintended results exists. Lawyers who receive physical evidence of their client's crime may be subject to prosecution for failure to deliver that evidence to police authorities. The statute that creates the legal duty is a general one covering tampering with physical evidence, which is patterned on the Model Penal Code that itself indicates no intention to cover criminal defense attorneys. However, the language is potentially broad enough to encompass failure to disclose by the attorney, and it has been so interpreted. Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897, 919-20 (1986).

59. 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 50, § 46.03 (courts are

Mexico and Oklahoma may read their state statutes as abrogating the attorney-client privilege. More generally, where a reporting statute is entirely silent on the treatment of the attorney-client privilege, some ambiguity exists as to whether abrogation of the attorney-client privilege was intended by the legislature.⁶⁰ Statutes in several states should be amended to clear up such ambiguity.

II. THE APPLICATION OF ATTORNEY-CLIENT PRIVILEGE TO OUT-OF-COURT DISCLOSURE REQUIREMENTS OF CHILD ABUSE REPORTING STATUTES

Assuming, as argued above, that the attorney-client privilege is preserved in its generally accepted form, the immediate issue is the impact of the privilege upon the duty to *report* child abuse. The problem is squarely presented by a statutory structure such as that in Delaware, which preserves the attorney-client privilege without making any reference to the impact of the privilege on reporting duties.⁶¹

Does this statutory pattern mean that information gained through communications that would be covered by the attorney-client privilege if the lawyer were called as a witness to testify may not be the basis for required reporting of child abuse? Stated differently, does the privilege bar in-court testimony exclusively or does it protect against compelled out-of-court disclosures as well? The significance of these questions should be obvious for the interpretation of the reporting requirements. If the privilege protects

to apply the expressed intent of statute); *id.* § 46.04 (courts bound to give effect to literal meaning of statute's language without consulting other indicia of intent).

60. In the related area of clergyman-penitent privilege, abrogation was found based on the failure explicitly to preserve the privilege, the apparent clarity of the application of the reporting requirement to the clergy, and the fact that the reporting requirement was passed after the legislation establishing the clergyman-penitent privilege. *Op. Tex. Att'y Gen. No. JM-342* (Aug. 5, 1985); David T. Fenton, Note, *Texas' Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse*, 38 *BAYLOR L. REV.* 231 (1986). *Cf. Human Servs., Inc. v. Woodward*, 765 P.2d 1052, 1054-55 (Colo. Ct. App. 1988) (social worker privilege not abrogated by provisions of child abuse reporting statute because enacted after abuse reporting act).

The statutory pattern present in Texas regarding the clergyman-penitent privilege is not generally found with regard to the attorney-client privilege. The above reasoning is thus inapplicable to states like Nebraska, North Carolina, and Tennessee. It may, however, have application in Connecticut, New Jersey, and Utah, although in the latter the legislative history complicates analysis. *See supra* note 53.

61. *DEL. CODE ANN.* tit. 16, § 908 (1983). On this issue, the same legislative pattern also exists in Idaho, Texas, and Wyoming. *See supra* note 51.

only against in-court disclosures, then a reporting requirement applied to lawyers and the attorney-client privilege do not directly conflict; the privilege is not violated by reporting requirements, which compel disclosures that are beyond the scope of the privilege.⁶²

In this Part, I examine whether the attorney-client privilege applies to out-of-court disclosures.⁶³ Remarkably, the issue is not clearly answered by established law.⁶⁴ The reason that the privilege has not been explicitly recognized to cover state-mandated out-of-court reporting appears not to have been the result of any

62. However, although the concepts have legally distinct foundations, it may not be so certain that the attorney-client privilege can be separated from the confidentiality principle of rules of professional responsibility with regard to interpretation of legislative intent. At least as used popularly or colloquially, some authorities suggest that "the privilege" may be taken to mean some combination of the two concepts. NORMAN REDLICH, *PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH* 10 (2d ed. 1983); Jennifer Cunningham, Note, *Eliminating "Backdoor" Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992, 999 (1990). Courts and other authorities commonly mingle the two concepts uncritically. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:108, at 142.2 (2d ed. Supp. 1991). However, notwithstanding this occasional careless commingling of the two concepts, there is no evidence that legislatures purposefully or inadvertently encompassed the confidentiality principle embodied in the ethics rules within the protection afforded under the attorney-client privilege.

63. An examination of the more fundamental issues regarding the theoretical underpinnings of the law of privilege and how the privilege should be defined is undertaken later in Parts IV and V.

64. Indeed, some scholars appear simply to assume the privilege applies. See J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 340 (1976) (making extremely broad claim for scope of attorney-client privilege that would clearly apply it in compelled reporting circumstances). Others, however, recognize the issue as an undecided one. See David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 494 (1986) (because privilege determined in context of adversary proceeding in courtroom, it is impossible to say whether it exists outside that context); Mitchell, *supra* note 22, at 787 (authorities inconclusive); Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143, 158-59 (1984) (whether privilege applies only to restrict production of testimony in judicial proceedings is a rarely discussed issue as to which the answer is unclear). Still others give conflicting answers. See 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* 436 (1986) ("[I]t is generally understood that the privilege does not govern extrajudicial disclosures by the attorney."). But see *id.* at 426 (privilege covers situations such as disclosure of information gained pursuant to a search warrant by exercise of governmental power outside the courtroom).

theoretical limitation on the privilege but rather the result of there being virtually no occasion for the extension. Lawyers are rarely compelled to divulge client confidences by statutes that require out-of-court disclosures.⁶⁵ Child abuse reporting requirements provide one of the few modern examples of such compulsion.⁶⁶

A. *Existing Authorities Cast Little Light on the Propriety of Extending the Attorney-Client Privilege to Out-of-Court Disclosures Requirements*

Direct authorities on this aspect of the scope of the privilege are scattered, inconclusive, and unimpressive. The existing opinions are frequently of little value because they generally have dealt with privileges other than the attorney-client privilege⁶⁷—the legis-

65. The requirement of the Internal Revenue Code that lawyers furnish information when a client pays the lawyer more than \$10,000 in cash, 26 U.S.C. § 6050I (Supp. II 1990), like child abuse reporting statutes, compels such disclosures. Courts have typically found that the statute does not violate the attorney-client privilege because the disclosure does not involve a confidential communication for legal advice, *see, e.g.*, *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-05 (2d Cir. 1991), a conclusion that is unsound theoretically when made as a matter of definition. *See* Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 GEO. WASH. L. REV. 307, 346-48 (1991) (concluding that a blanket exclusion of fee information from attorney-client privilege is erroneous because in some cases the information is indeed intended to be confidential and its disclosure would reveal legitimate legal communications); *see also* David F. DuMouchel & Cynthia J.H. Oberg, *Defense Attorney Fees: A New Tool for the Prosecution*, 1 DET. C.L. REV. 57, 75-78 (1986) (making strident assertion that disclosure requirements "impinge upon and may directly violate" attorney-client relationship); Catherine A. Earl, Note, *Will This Be Cash? The Validity of Internal Revenue Code Section 6050I and the Attorney-Client Relationship*, 21 CREIGHTON L. REV. 893 (1988) (analyzing issues of attorney-client privilege, professional ethics, and constitutional rights implicated by cash reporting requirement). However, the claim that the statute avoids conflict with the privilege because it requires only out-of-court disclosures does not appear to have been made.

66. The basic principle at work in the child abuse reporting statutes has a counterpart in the ancient crime of misprision of a felony. For a discussion of misprision and some of the differences between it and contemporary reporting statutes, *see infra* note 209.

67. Attorney general opinions from Utah and Wisconsin construe other evidentiary privileges as limited to testimony in judicial proceedings. *Op. Utah Att'y Gen. No. 82-87* (Feb. 17, 1983) (state clergyman-penitent privilege protects against compelled testimony in judicial proceedings but does not prevent required reporting of child abuse); *Op. Wis. Att'y Gen. No. 10-87* (Mar. 16, 1987) (physician-patient privilege does not prohibit disclosure of confidential communications outside of evidentiary court proceeding). The intermediate appellate court in Alaska reached a similar result for the physician-patient privilege, although its analysis rested in part on the limited authorization given to the state supreme court to promulgate privilege rules. That authorization extended exclusively to judicial proceedings. The same limitation was not necessarily applicable to the attorney-client privilege, which has a broader basis for its existence. *Walstad v. State*, 818 P.2d

lative authorization for creation of which, unlike the broader authorization for the attorney-client privilege, is limited only to judicial proceedings.⁶⁸ Be that as it may, several authorities flatly assert in terms that appear generally applicable to all evidentiary

695, 697-98 (Alaska Ct. App. 1991).

The only clear authority for an extension of the privilege to out-of-court disclosures is found in an intermediate appellate court opinion from Maryland. See *Shaw v. Glickman*, 415 A.2d 625, 630 (Md. Ct. Spec. App. 1980) (finding that privilege applicable to psychiatrist or psychologist prohibited disclosure of information out-of-court regarding dangerousness of patient: "It seems to us that inasmuch as the statute confers a privilege of confidentiality on the communication between patient and psychiatrist-psychologist in judicial, legislative, or administrative proceedings . . . , no lesser privilege is existent when the matter is not judicial, legislative, or administrative."). On the basis of this opinion, the Maryland Attorney General's Office reversed a previously expressed opinion that privileges did not constrain reporting requirements. Compare 74 Op. Md. Att'y Gen. 128 (1989) with 62 Op. Md. Att'y Gen. 157 (1977).

While the specific issue of the out-of-court application of the privilege was not examined directly, *People v. Belge*, 372 N.Y.S.2d 798 (Co. Ct.), *aff'd mem.*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd per curiam*, 359 N.E.2d 377 (N.Y. 1976), also supports the position that the privilege applies to disclosure requirements. In that case, attorney Belge, who had been told of the location of murder victims by his client, was charged with a criminal offense under the public health laws for failure to provide a report to proper authorities of the death. 372 N.Y.S.2d at 799. The trial court concluded that because Belge had learned of the location of the bodies through a conversation falling within the attorney-client privilege, that privilege in combination with the client's Fifth Amendment right meant that Belge could not be prosecuted under the make-weight statutory offense charged. *Id.* at 802-03. The result was supported by a state ethics opinion that, like the trial court opinion, acknowledged no real issue as to the out-of-court application of the privilege. N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 479 (1978), *reprinted in* N.Y.L.J., Mar. 7, 1978, at 24. The ethics opinion concluded that, under the confidentiality principles of the attorney-client privilege and the ethics rules, a lawyer "was duty-bound not to reveal to the authorities the location of the bodies." *Id.*; see also Indianapolis Bar Ass'n Legal Ethics Comm., Op. 1-1986 (Apr. 29, 1986) (assuming application of privilege to child abuse out-of-court reporting requirements).

Belge undeniably supports the out-of-court application of the attorney-client privilege in the face of a reporting statute. Its value as precedent is limited, however, by the very strong support for protection provided by the Fifth and Sixth Amendment rights of the client. The client had already been formally charged with one murder, and the lawyer's information about the other crimes had a potential impact upon the client's insanity defense in that already commenced prosecution. Thus, the privilege in *Belge* did not have to stand alone. That fact, in combination with the weakness of the statutory disclosure requirement involved in the offense of failing to disclose known deaths, means that the question of out-of-court application of the attorney-client privilege was hardly given a real test.

68. See *Walstad*, 818 P.2d at 697 & n.2 (noting that psychotherapist-patient and clergyman-penitent privileges were promulgated by state supreme court pursuant to its authority to make rules governing procedure in civil and criminal cases and do not rest on any independent basis, in contrast to the attorney-client privilege which is "inextricably tied to the constitutional right to counsel").

privileges that they have no impact on reporting statutes.⁶⁹ If this conclusion is correct for evidentiary privileges generally and applicable to the attorney-client privilege particularly,⁷⁰ reporting statutes have an extremely significant impact on client confidences. However, because the authorities are so limited, analysis of them alone can produce no firm resolution of the issue. Nevertheless, they do demonstrate that whether the attorney-client privilege applies at all to reporting statutes is a live issue.

B. *Contemporary Expansions of the Privilege Lend Support to Its Application to Out-of-Court Disclosure Requirements*

A potentially more fruitful mode of addressing the issue is to examine other expansions of the attorney-client privilege during the second half of the twentieth century and to analyze the implications of the general principles recognized as justifying the privilege. The privilege is now accepted as extending beyond judicial proceedings, where it began, to administrative and legislative proceedings, as well as to production of evidence for a grand jury.⁷¹ Further extension of the privilege to protect against required disclosure of information in response to state compulsion would appear to be consistent with these earlier types of developments in the law of privilege⁷² where extension is necessary to the preser-

69. See Op. Utah Att'y Gen. No. 82-87 (Feb. 17, 1983); Op. Wis. Att'y Gen. No. 10-87 (Mar. 16, 1987).

70. The response that the attorney-client privilege is basically different from other privileges in that it has a constitutional basis is not satisfactory. As discussed more fully below in Section IV(C), the constitutional underpinning for the attorney-client privilege is very limited and cannot generally justify treating it differently than other evidentiary privileges, some of which themselves have at least arguable constitutional support. See *In re Lifschutz*, 467 P.2d 557, 567-68 (Cal. 1970) (client's interest in confidentiality of patient-psychiatrist privilege has some constitutional basis in right of privacy); Mitchell, *supra* note 22 (arguing for constitutional basis for clergyman-penitent privilege).

71. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.4, at 255 (Practitioner's ed. 1986) (noting that it is now generally accepted that governmentally coerced revelations before grand jury and administrative hearings fall within privilege); see also 1 SARA S. BEALE & WILLIAM C. BRYSON, GRAND JURY LAW & PRACTICE § 6.23, at 141 (1986) (noting that witness can lawfully resist any subpoena on the ground that it calls for material protected by recognized evidentiary privilege, including attorney-client privilege). Only a few decades ago, these issues were in substantial doubt. See Annotation, *Physician-Patient, Attorney-Client, or Priest-Penitent Privilege as Applicable in Nonjudicial Proceeding or Investigation*, 133 A.L.R. 732 (1941).

72. Professor Hazard argues that the attorney-client privilege developed to avoid an anomaly in the law. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1083 (1978). At the time of the development of

vation of the confidential relationship.⁷³ An analogy may also be drawn to the well-recognized principle that an attorney may not defeat the privilege indirectly by transmitting a statement regarding a client's confidential communication through a third party.⁷⁴

C. *Applying the Attorney-Client Privilege to Out-of-Court Disclosure Requirements Is Consistent with Its Underlying Theory*

As developed more fully in Part IV, privileges are primarily supported in contemporary legal theory by a utilitarian theory.⁷⁵

the privilege, a party could not testify, even if called as an adverse witness. The privilege was developed, it appears, to prevent the obtaining of information from a party's attorney that is not obtainable directly from the party. *Id.*

As to an ancient counterpart to child abuse reporting laws, misprision of a felony, the English authorities were not worried by the suggestion that the attorney-client privilege would provide a defense for failure to report a known crime. *Sykes v. Director of Pub. Prosecution*, [1962] A.C. 528, 564 (1961) (Lord Denning). For a more complete discussion of the implications of misprision to the current issue, see *infra* note 209.

73. The broad reading of the Fifth Amendment in *Miranda v. Arizona*, 384 U.S. 436 (1966), supports the expansion of attorney-client privilege to protect against compulsion occurring outside the courtroom. *Miranda* determined that police questioning in a custodial setting constitutes compulsion within the meaning of the Fifth Amendment. This out-of-court pressure has been called "informal compulsion" because, prior to that decision, the Fifth Amendment had been applied only in contexts of formal legal compulsion occurring in the courtroom.

Although this expanded reading of the Fifth Amendment constituted a significant change in the law, the extension of the concept of compulsion to events occurring outside the courtroom had an arguable basis in both the policy and history of the amendment. As with the traditional limitation of the attorney-client privilege to the courtroom setting, the initial recognition of compulsion only in formal legal compulsion was a result of the historical pattern in which compulsion was typically exerted. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436-39 (1987). Thus, the acknowledgement that constitutionally recognizable compulsion can and does occur outside a judicial proceeding supports a similar expansion of the attorney-client privilege under common law principles to include out-of-court disclosures required by statute. Certainly, the sufficiency of the legal compulsion cannot be in doubt when based on a reporting statute backed by criminal sanctions, as contrasted to that somewhat more problematic additional element of the *Miranda* decision. See Schulhofer, *supra*, at 440-53 (discussing issue of whether interrogation constitutes compulsion).

74. 8 WIGMORE, *supra* note 16, § 2325, at 632; see also *Himmelfarb v. United States*, 175 F.2d 924, 939 (9th Cir. 1949) (noting that admission of evidence voluntarily disclosed by attorney would violate privilege as much as attorney's testimony on stand), *cert. denied*, 338 U.S. 860 (1949); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1106 (1985) ("Strictly speaking, the privilege is not relevant to the attorney's out-of-court treatment of client confidences. But it always has been understood that if attorneys were free to divulge confidences out of court that were protected by the privilege in court, the privilege would be of limited value, if not useless.").

75. Professor Wigmore, who is largely responsible for both the contemporary under-

Under this theory, confidentiality is necessary to encourage full disclosure of information, which is deemed useful in furthering a valuable social goal. The implications of a utilitarian theory strongly support the protection of out-of-court disclosures.

Building the concept of evidentiary privileges on a utilitarian theoretical basis has consequences for the nature of the doctrine created.⁷⁶ In specific, since a privilege is designed to enhance social good by encouraging candor in communication, it needs to operate clearly and explicitly.⁷⁷ It is very difficult to see how full disclosure by the client can be fostered under an assurance of confidentiality if "confidentiality" means that the damaging information may be transmitted to the state under reporting requirements and used to investigate and prosecute the client.⁷⁸ Even if the state is ultimately prohibited from calling the lawyer as a witness at the client's trial, the major damage would have been done,⁷⁹ and the promise of secrecy, compromised in this important

standing and the misunderstanding of the privilege, 24 WRIGHT & GRAHAM, *supra* note 64, § 5472, at 71-79, attributes the early non-utilitarian basis of the privilege to principles of professional honor and asserts that those non-utilitarian justifications are no longer recognized as a basis for the privilege. 8 WIGMORE, *supra* note 16, § 2290, at 543-45; *id.* § 2291.

Support for some variant of a non-utilitarian theory of the privilege, which I describe in Part IV as a rights-based theory, has probably always been stronger and more complex than Wigmore acknowledged. 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 208, at 731-32 (1985); 24 WRIGHT & GRAHAM, *supra* note 64, § 5472, at 76-79. Accepting another rationale would have an impact on the shape of the privilege developed. The point of the above argument is not that no other rationale can be imagined or supported. Rather, it is that, if courts accept the utilitarian rationale as the dominant theoretical justification of contemporary evidentiary privileges, then extending protection to out-of-court disclosures compelled by the state is highly consistent with the theory of the privilege. The extension would also be supported by some alternative theories of the privilege, particularly certain versions of a rights-based privilege.

76. 24 WRIGHT & GRAHAM, *supra* note 64, § 5472, at 86.

77. *Id.*

78. Some commentators have argued that competing interests should be reconciled by permitting disclosures to be used only for the purpose of protecting the child. *See, e.g.*, Nancy E. Stuart, Note, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 258 (1987) (arguing that courts should impose mandatory duty on attorneys to report but to limit reporting to initial report going to civil authorities only). For the most part, these recommendations have not been followed. *See, e.g.*, *People v. Bowman*, 812 P.2d 725, 729 (Colo. Ct. App. 1991) (finding purpose of reporting statutes not merely to remove victim from harm but also to aid in prosecution of perpetrator) (citing *People v. Battaglia*, 203 Cal. Rptr. 370, 373 (Ct. App. 1984)). However, there are some exceptions. *See infra* notes 89-90.

79. *People v. Morton*, 543 N.E.2d 1366, 1373 (Ill. App. Ct. 1989) (if therapist re-

way, would prove ineffective in facilitating open and free confiding of sensitive information.⁸⁰

Indeed, if statements made by a client are known to be subject to mandatory disclosure to third parties, then the privilege is wholly destroyed. In fact, the privilege will never come into existence because statements are privileged only if they are intended to be kept confidential.⁸¹ If a client knows that his statements will be disclosed, he cannot have the intent of keeping the statements confidential. Moreover, if the law requires disclosure, many lawyers will inform their clients that the attorney-client privilege does not cover statements revealing possible abuse; indeed, they may be

quired to report conversation to state social services department, incentive to speak accurately is virtually eliminated even if conversation is not admissible in court), *appeal denied*, 550 N.E.2d 563 (Ill. 1990); Phyllis Coleman, *Creating Therapist-Incest Offender Exception to Mandatory Child Abuse Reporting Statutes—When Psychiatrist Knows Best*, 54 U. CIN. L. REV. 1113, 1140 n.126 (1986) (arguing that privilege from testimony is not the important issue because if the psychiatrist is required to report any sexual abuse disclosed by the patient the harm has already occurred); Mitchell, *supra* note 22, at 790 (arguing that “[i]f the rationale for the privilege is the concern with privacy for intimate relationships, that privacy is shattered by compelled disclosures in the form of a report as much as by compelled disclosures in a courtroom”) (footnote omitted).

80. In a related context, the Supreme Court of Pennsylvania recently recognized that legislation granting to sexual assault counselors a privilege not “to be examined in any court or criminal proceeding,” 42 PA. CONS. STAT. ANN. § 5945.1(b)(1) (Supp. 1992), must be extended to subpoenas for records and other documents developed in the counseling relationship. *Commonwealth v. Wilson*, 602 A.2d 1290, 1295 (Pa. 1992). Otherwise, the court observed, the confidentiality which the statute purports to provide to the statements of the rape victim would cease to exist and insulating the counsel from giving testimony would be inconsequential. *Id. Wilson* shows that courts recognize their ability to extend the protections of a statutorily defined privilege beyond its literal bounds when they believe it necessary to satisfy the underlying purpose animating the creation of the privilege.

81. See, e.g., 1 MCCORMICK ON EVIDENCE, *supra* note 47, § 91, at 333 (“It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.”).

ethically obligated to do so.⁸² Then, not even the in-court privilege will apply to the statements.⁸³

Unfortunately, subtle issues such as the application of the privilege to statutorily mandated out-of-court disclosures, on a subject as complicated and conflicting as privilege, can rarely be decided on the basis of fundamental principles alone. This is particularly true when the fundamental principles themselves are subject to debate.

We have long recognized that the utilitarian theoretical basis for the attorney-client privilege rests on an uncertain foundation. Little empirical evidence exists on the question of whether individuals confide critical information about themselves in reliance on the fact that the information will be protected by privilege.⁸⁴ As well, we are not inevitably committed to the utilitarian rationale for the privilege and may, if we choose, blend it with aspects of a non-utilitarian theory that could permit explicit recognition of imperfect protection of confidences.⁸⁵

82. See Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990) (arguing that while not constitutionally required to do so, attorney has a moral duty to inform client of limits of confidentiality so that client can gauge the costs and benefits of full disclosure); Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703 (1988) (arguing that attorneys are ethically obligated to explain confidentiality rules to clients and that, given the substantial number of exceptions, the limitations on confidentiality should be carefully and sensitively explained). Cf. Op. Md. Att'y Gen. No. 90-007 (Feb. 8, 1990) (discussing letter that director of clinic for sexual disorders sent to prospective clients warning that disclosure of child sexual abuse would be reported under some circumstances to state authorities). For a discussion of the proposal that *Miranda*-type warnings should be given, see Fried, *supra* note 64, at 491 n.270; W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 786-87 (1981).

83. See *Morton*, 543 N.E.2d at 1373 (noting that therapist advised client that under law, conversation was not confidential); *Commonwealth v. Arnold*, 514 A.2d 890, 895 (Pa. Super. Ct. 1986) (defendant "on notice from the law" that statements could be used in court proceedings and had no privilege of confidentiality); see also 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND FOR STATE COURTS* ¶ 503(a)(4)[01] (1991) (statements by client that are anticipated to be disclosed in court documents not confidential and therefore not privileged).

84. See *infra* note 166.

85. Cf. 1 MCCORMICK ON EVIDENCE, *supra* note 47, § 87, at 316-17 (noting that current state of the law under which the privilege is supported by an amalgam of justifications is not conducive of predictability in application of the privilege that is logically indispensable under a utilitarian rationale).

Moreover, even if we accept generally the utilitarian rationale, we remain uncertain that the goals furthered by the most extreme applications of privilege are worth the price paid.⁸⁶ Our society recognizes important competing values besides the preservation of confidences and the improvement in legal representation engendered by such preservation. The most obvious competing goal is that of reaching the correct determination in litigation—privilege often stands directly in the way of that accurate determination by restricting access to truthful and valuable information.

As a consequence of both our uncertainty about the utility of privileges and our recognition of their explicit costs, we frequently limit the scope of privileges short of their logical conclusions.⁸⁷ One limitation most relevant to the issue of child abuse reporting is the proposition that evidence obtained indirectly through use of the confidential communication, termed “derivative use,” is not excluded. There is no “fruit of the poisonous tree” doctrine applicable to privileges because the underlying policy supporting them is not sufficiently strong to bear its very substantial costs.⁸⁸

Recognition of non-utilitarian justification for privileges, depending upon the precise dimensions of that rationale, could have a number of other important consequences for the shape of the privilege itself, such as curtailing the privilege for corporations, extending privileges to relationships more intimate than that of attorney and client, and wresting control of the privilege from the client. 24 WRIGHT & GRAHAM, *supra* note 64, § 5472, at 79. Although some of the modifications in the privilege that would flow from a change in theory would be congenial to majority sentiments, others tend to be somewhat subversive and therein lies at least part of the explanation for why the utilitarian theory has remained dominant. *Id.*

86. As Wigmore conceded with regard to the attorney-client privilege: “Its benefits are all indirect and speculative; its obstruction is plain and concrete.” 8 WIGMORE, *supra* note 16, § 2291, at 554.

87. Wigmore also observed that, as a consequence of our recognition of the substantial costs of the privilege, it is generally accepted that the privilege “ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.” *Id.* Courts quickly cite this argument when giving the privilege a narrow scope. *See, e.g., In re Horowitz*, 482 F.2d 72, 81–82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

As discussed more fully *infra* in Sections IV(A) and IV(B), proponents of the privilege argue that it is supportable both for the utilitarian reasons that Wigmore accepted and on the basis of an additional rights-based argument that serves the goal of individual autonomy.

88. SEC v. OKC Corp., 474 F. Supp. 1031, 1040 (N.D. Tex. 1979) (attorney-client privilege does not enjoy a “level in the hierarchy of values” to justify suppressing “fruits” of its violation); *Walstad v. State*, 818 P.2d 695, 699 n.6 (Alaska Ct. App. 1991) (expressing considerable doubt that “fruits” of violation of privilege should be suppressed); 2 WEINSTEIN & BERGER, *supra* note 83, ¶ 512[03] (generally courts will admit fruits of matters improperly revealed under influence of “general policy in favor of truth rather

Within the field of child abuse itself, courts in several jurisdictions have in fact concluded that privilege laws can tolerate limited-purpose disclosure. They have recognized that although disclosure of abuse is required under the reporting statutes, privilege laws for other professionals may continue to prohibit admission of the confidential conversations in judicial proceedings,⁸⁹ acknowledging that the law requires the courts to pursue multiple, sometimes conflicting, policies.⁹⁰

In spite of these decisions, reconciling such a "compromise" between revelation and disclosure with the theory of privilege remains problematic. Limitations in the use of the information may have an appropriate role in softening the punitive aspects of our child abuse laws that may, for example, interrupt valuable treatment relationships or precipitate family disintegration.⁹¹ Those

than exclusion"). Cf. *United States v. Rogers*, 751 F.2d 1074, 1077-80 (9th Cir. 1985) (violation of attorney-client privilege by disclosures secured from defendant's former attorney by government agent does not compel dismissal of charges even though disclosures may have encouraged continued investigation and indictment of defendant). The authorities on this issue are hardly so numerous or substantial that the law can be characterized as firmly settled. However, nonrecognition of the "fruits" concept represents the dominant contemporary judicial position.

89. See *State v. R.H.*, 683 P.2d 269, 280-81 (Alaska Ct. App. 1984) (holding that abrogation of physician-patient privilege in child abuse reporting statute applied only to child protection proceedings and not to criminal prosecutions); *State v. Sypult*, 800 S.W.2d 402, 404-05 (Ark. 1990) (language in reporting statute admitting evidence in spite of physician-patient privilege construed to permit use of facts required by report but did not permit discovery of patient's statements to doctor); *People v. Bowman*, 812 P.2d 725, 729 (Colo. Ct. App. 1991) (reporting requirement and privilege for statements to social worker "reconciled" by permitting report but excluding testimony in court); *State v. Andring*, 342 N.W.2d 128, 132-33 (Minn. 1984) (reaching same result as in *Sypult*, 800 S.W.2d at 404-05).

90. *Andring*, 342 N.W.2d at 132-33 (recognizing that the major goal of its reporting statute is protection of children, not punishment of offenders, and pursuing treatment as important to future welfare of child); see also *Sypult*, 800 S.W.2d at 404-05 (same, following *Andring*).

91. Texas has limited the use of information provided under its abuse reporting statutes to the protection of the child, not the punishment of the abuser. *Dominguez v. Kelly*, 786 S.W.2d 749, 752 (Tex. Ct. App. 1990) (holding that purpose of statute, which calls for nonaccusatory reports, is to "foster protection for abused children and not to cause penalty to others"). Cf. *Daymude v. State*, 540 N.E.2d 1263, 1265-66 (Ind. Ct. App. 1989) (statement made during court-ordered counseling with father as part of treatment program for family of child found "in need of services" remained protected because psychiatrist's privilege not abrogated beyond the purpose of the statute, which is to identify victims for immediate attention and not to prosecute alleged abusers). See generally William W. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473 (1990) (arguing generally that Fifth Amendment privilege should be applied gener-

limitations, however, make little if any sense in terms of encouraging frank exchanges of information between a client and his lawyer.⁹²

D. *Conclusions and Specific Applications to Reporting Statutes*

Although extension of the attorney-client privilege to out-of-court reporting requirements is hardly compelled by the above analysis, recognizing the privilege in this context is more consistent with the dominant underlying theory supporting privileges than is limiting disclosure. As a result, when courts are interpreting the law of privilege under common law principles, they should hold that the attorney-client privilege covers otherwise compelled disclosures by attorneys under child abuse reporting statutes.

In a large number of states, however, the attorney-client privilege is no longer defined exclusively by the common law but is defined by rule or statute.⁹³ In most states, the statutory definition of the privilege unfortunately provides no additional gloss beyond the common law and does not speak directly to the application of the privilege outside the courtroom.⁹⁴ Likewise, the specific provi-

ously to foster family reunification rather than restrictively so as to maximize prosecution); *see also* Besharov, *supra* note 5, at 554-62 (discussing unwarranted and harmful intervention into private family matters that may result from a well-intended but overzealous enforcement of child abuse laws).

92. Disclosure is also incompatible with the rights-based justification of the privilege that is premised on protecting the autonomy of the client. *See infra* Section IV(B). The revelation denies autonomy in that it will likely subject the client to imposition of outside control by civil and/or criminal authorities, and the disclosure itself is against the will of, and without the permission of, the client.

93. A substantial number of states adopted a version of either the proposed Federal Rule 503, 56 F.R.D. 183, 235-40 (1972) or Uniform Rule 502, UNIF. R. EVID. (1974) & REV. UNIF. R. EVID. (1986). These states include Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont, and Wisconsin. 2 WEINSTEIN & BERGER, *supra* note 83, ¶ 503[03].

Some states that adopted a version of the Federal Rules of Evidence did not enact a rule regarding attorney-client privilege. These states include Arizona, Colorado, Iowa, Louisiana, Michigan, Minnesota, Montana, North Carolina, Ohio, Utah, Washington, West Virginia, and Wyoming. *Id.* In many of these states, the common law definition remains. *See, e.g.,* Bersani v. Bersani, 565 A.2d 1368, 1370 (Conn. Super. Ct. 1989) (common law controls privilege in Connecticut); 1 HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE § 62 (3d ed. 1988) (relying on caselaw, rather than statutory law, to define attorney-client privilege in North Carolina).

94. 2 WEINSTEIN & BERGER, *supra* note 83, ¶ 503[03].

sions in reporting laws relating to privileges are of little help in deciding the scope of the privilege.⁹⁵ On the other hand, none of these codifications appear to prevent courts from extending the privilege to cover state-mandated out-of-court reporting requirements through traditional judicial analysis.⁹⁶

Under the above analysis, attorneys should be obligated to make a report based on information covered by the traditional attorney-client privilege in few if any of the states that require attorneys to report abuse. Denial of the protections apparently offered by the privilege was not specifically intended by the statutes. Abrogation in the context of reporting requirements⁹⁷ should not be the product of the historical accident that privileges traditionally have only been needed to protect against compelled testimony in judicial proceedings, a limitation not at all required by the theory of the privilege itself.⁹⁸

New Jersey constitutes an exception to this pattern. Its statute provides an expansive scope for privileges in general that appears broad enough to cover reporting statutes. The provision on the "Scope of the Rules" states:

The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

N.J. STAT. ANN. § 2A:84A-16(1) (West 1976). The attorney-client privilege is contained within article II, codified at *id.* § 2A:84A-20.

95. As noted above, those provisions might be read to suggest an extension of the privilege to reporting requirements in Florida, Indiana, Kentucky, New Hampshire, and Rhode Island, but little confidence can be placed in that interpretation of the statutory language. See *supra* note 49 and accompanying text.

96. Nevertheless, these codifications, with the exception of that in New Jersey, provide no affirmative assistance to the argument that the privilege applies to required reporting of information outside judicial proceedings. This failure contrasts somewhat with several of the statutory codifications of the clergyman-penitent privilege that use language suggestive of a broader application. See, e.g., ILL. ANN. STAT. ch. 110, § 8-803 (Smith-Hurd 1984) ("to disclose in any court, or to any administrative board or agency, or to any public officer"); KY. REV. STAT. ANN. § 421.210(4) (Baldwin 1979) ("any civil or criminal case or proceedings preliminary thereto"); 42 PA. CONS. STAT. ANN. § 5943 (1982) ("in any legal proceeding, trial or investigation before any government [sic] unit"); see also Mitchell, *supra* note 22, at 787-89 (most clergyman-penitent privilege statutes do not state the scope of their application; those that do often state the scope broadly). In these same states, either there is no codification of the attorney-client privilege at all, as in Illinois, or the language used contains no language similarly suggestive of a broader application. KY. REV. STAT. ANN. § 421.210(4) (Baldwin 1979); 42 PA. CONS. STAT. ANN. § 5916 (1982).

97. Abrogation in this context may effectively mean total abrogation. See *supra* notes 81-83 and accompanying text.

98. One of the reasons this element of the scope of the attorney-client privilege is not often addressed is that in most situations the attorney-client privilege is supplemented

In this Part, I have examined the implications of the law as it stands today regarding the interaction between reporting laws and the attorney-client privilege, but that state of the law need not continue. Other than some limited constitutional constraints, the attorney-client privilege is subject to legislative change with respect to both its overall definition and reporting requirements. New legislative action could establish clearly and explicitly a different set of outcomes than those developed above. In Parts IV and V, I address the limited constitutional constraints upon legislative change of the privilege and the considerations that should guide any such revamping of the privilege laws. However, before proceeding to that more basic analysis, it is first useful to examine the role of the other major body of doctrine protecting lawyer-client confidentiality—the rules of professional ethics.

III. THE IMPACT OF THE ETHICAL PRINCIPLE OF CONFIDENTIALITY ON ATTORNEY REPORTING OF CHILD ABUSE

In addition to the attorney-client privilege, the confidentiality of lawyer-client communications is governed by rules of professional ethics.⁹⁹ The law of privilege and the ethical principle of confidentiality overlap to a substantial degree, but they have different dimensions. In some circumstances the privilege is broader, and in others it is narrower, than the ethical confidentiality principle.¹⁰⁰

by bar ethics rules that require an attorney to maintain the confidentiality of information gained through out-of-court disclosures that would be protected by the privilege. See 1 HAZARD & HODES, *supra* note 62, § 1.6:108, at 142.3 ("The relationship between the attorney-client privilege and the confidentiality principle has great practical significance, for although lawyers often assert the privilege as a matter of instinct, they are ethically required to do so by the broader [confidentiality] principle."); see also MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 22 ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.").

99. See MODEL CODE, *supra* note 17, DR 4-101; MODEL RULES, *supra* note 17, Rule 1.6.

100. The question of which set of rules is broader is complicated by the fact that different decisionmakers are involved. Commentators agree that ethics committees tend to accord the rules of confidentiality a broad reading while courts lean toward much narrower construction of similar principles under the attorney-client privilege. 24 WRIGHT & GRAHAM, *supra* note 64, § 5472 at 90; Subin, *supra* note 74, at 1098.

The rules of professional conduct establish that an attorney may not disclose a client's "confidential information" except in limited circumstances, and that a lawyer violating that prohibition is subject to discipline.¹⁰¹ As defined in the ethics rules, "confidential information" includes not only information protected by the attorney-client privilege but also "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."¹⁰² The confidentiality concept also includes information gained from others beside the client.¹⁰³ Without question, this ethical duty of confidentiality applies outside formal judicial proceedings.¹⁰⁴

The confidentiality principle has two major exceptions applicable in the child abuse reporting situations. Both of these exceptions typically permit, rather than require, disclosure. The first gives the attorney discretion to reveal information when "required by law or court order."¹⁰⁵ The second gives the attorney discretion to reveal confidential information about "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."¹⁰⁶ Each exception will be discussed in turn.

101. MODEL CODE, *supra* note 17, DR 4-101(B) ("Except when permitted under DR 4-101(C), a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client."); MODEL RULES, *supra* note 17, Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).").

102. MODEL CODE, *supra* note 17, DR 4-101(A). The Model Rules provide a similar but somewhat expanded definition of protected information, covering all information "relating to the representation" of the client whether acquired by the attorney before or after the relationship began and providing protection without regard to whether the client indicated the information was to be confidential. MODEL RULES, *supra* note 17, Rule 1.6 & cmt. at 25-26.

103. MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 22.

104. 1 HAZARD & HODES, *supra* note 62, § 1.6:108, at 142.2.

105. MODEL CODE, *supra* note 17, DR 4-101(C)(2). The Model Rules do not contain such a provision, although the commentary states that "[t]he lawyer must comply with the final orders of a court" MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 25. Thus, Professors Hazard and Hodes argue, such an exception must be read into the Model Rules. 1 HAZARD & HODES, *supra* note 62, § 1.6:112.

106. MODEL CODE, *supra* note 17, DR 4-101(C)(3).

Model Rule 1.6(b)(1) provides a much more limited authorization for revealing information, permitting disclosure only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES, *supra* note 17, Rule 1.6(b)(1). This provision was the subject of great debate and substantial commentary. 1 HAZARD & HODES, *supra* note 62, § 1.6:302,

A. "Required by Law" Exception to Confidentiality Principle

The exception that gives lawyers the discretion to reveal information when "required by law" or court order typically meshes comfortably with the attorney-client privilege. The lawyer is obligated under the ethical confidentiality principle to refuse voluntarily to disclose information arguably covered by the attorney-client privilege. When, however, a court rules that the privilege is not available, the attorney is freed from the ethical constraint. Then, the attorney not only has the right to reveal the information but indeed may well be obligated to do so.¹⁰⁷

The reporting statutes do create a clear disclosure requirement where an attorney obtains information that otherwise would have been protected by the ethical confidentiality principle. As noted above, the ethics rules' definition of "confidential information" is broader than the attorney-client privilege. It includes information obtained from a third party as well as information obtained from the client but in the presence of unnecessary third parties,¹⁰⁸ neither of which is protected by the attorney-client privilege. The existence of a legal duty of lawyers to report abuse means that information defined as confidential under the ethics rules and out-

at 166 (provision engendered a "firestorm of protest").

However, although the provision of the Model Rules was passed by the ABA House of Delegates in this form, the much broader authorization for disclosure of the Model Code appears to remain predominant in the states. Sobelson, *supra* note 82, at 703 n.1, 743 n.211 (Model Rules not received enthusiastically and very few states have adopted the confidentiality provisions without revision, most rejecting the restriction of disclosure to serious crimes as proposed in the Model Rules). See *infra* note 128.

107. 1 HAZARD & HODES, *supra* note 62, §§ 1.6:108, 1.6:112 to :113.

Existing law does not definitively establish whether the attorney has an obligation to seek review of the ruling by interlocutory appeal. See Hodes, *supra* note 82, at 759 & n.70 (supporting such a duty). Typically the attorney may refuse to answer and be held in contempt, with enforcement of the sanction for contempt stayed until appellate review has been completed. 1 MCCORMICK ON EVIDENCE, *supra* note 47, § 92, at 340-41 & n.13. However, trial courts are not always so accommodating, and some authorities argue that the lawyer should not follow a course that obstructs the proceedings and should instead submit to the trial court's ruling unless in the attorney's judgment it is clearly wrong. *Id.* § 92, at 341 & n.14. Cf. *Balter v. Regan*, 468 N.E.2d 688, 689 (N.Y.) (affirming criminal contempt conviction against attorney who refused to represent client in violation of ethical rules regarding conflict of interest, appellate court recognizing lawyer's good faith but concluding he was not entitled to disobey trial court's order since any prejudice could have been remedied through the appellate process), *cert. denied*, 469 U.S. 934 (1984).

108. 1 HAZARD & HODES, *supra* note 62, § 1.6:108, at 142.2; MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 22.

side the attorney-client privilege must be reported, whereas the typically more significant confidential communications covered by the attorney-client privilege remain unaffected by this exception.¹⁰⁹

Whereas the attorney-client privilege, which has the force of law, may override reporting requirements, the command that a lawyer keep information confidential as part of her professional responsibility cannot supersede an otherwise mandatory legal duty to report.¹¹⁰ Therefore, the lawyer is obligated¹¹¹ to report abuse if learned from sources outside the attorney-client privilege, even though, but for the legal duty to disclose created by the reporting statute, the lawyer would be required to keep knowledge so learned secret under threat of professional discipline.

Furthermore, the exception to the ethics rules and the privilege conflict when child abuse reporting statutes are involved,

109. As set out in Part I, the reporting statutes, which I contend should reasonably be interpreted to require reporting by attorneys, should not be interpreted to abrogate the attorney-client privilege if silent on the issue. The reporting statutes have a different effect on the ethics confidentiality principle, however. The principal reason is that as contrasted to the privilege, the ethics rules need not be overridden. The "required by law" provision indicates that the ethics rules are to have no effect when disclosure is otherwise required by law; the ethics rules need not be abrogated insofar as they explicitly defer to any required disclosure requirement, which the reporting requirements surely constitute. A secondary distinction flows from the different status of these two sets of rules. As a matter of analysis of legislative intent, it is hard to argue that legislation that is silent about the privilege should be assumed to abrogate such a well-known and well-established protection against disclosure. Because of the ethics rules' much inferior status as a basis to resist disclosure, implicit abrogation is a much more reasonable interpretation.

110. WOLFRAM, *supra* note 71, § 6.7.3, at 301 (noting that except for information covered by the attorney-client privilege, confidential information is protected only against voluntary attorney disclosures and not against disclosures required by reporting laws or discovery rules); see also Lefstein, *supra* note 58, at 918 (no privilege attaches to "secrets" protected by ethics codes and courts are free to override the professional obligation of confidentiality for policy reasons); Sobelson, *supra* note 82, at 713 ("[T]he doctrine of 'secrets,' is a doctrine of ethics which is not, strictly speaking, binding upon the courts.") (footnotes omitted); Subin, *supra* note 74, at 1145 (ethical rules subservient to other statutory law, so attorney cannot invoke ethical rule of confidentiality to resist court-ordered disclosure outside attorney-client privilege).

111. "Obligation" is used here in the sense that failure to provide the information would result in the attorney committing a crime. There would be no obligation as such under most state's disciplinary rules that merely permit disclosure rather than requiring it. Professors Hazard and Hodes state the practical result as follows: "The law of lawyering itself does not create a mandatory duty to disclose, but if [the lawyer] comes to the conclusion that he is permitted to volunteer [information] . . . and may go to jail if he does not, the pressure to reveal will be virtually irresistible in practice." 1 HAZARD & HODES, *supra* note 62, § 1.6:114, at 153-54 (footnote omitted).

chiefly for procedural reasons.¹¹² The "procedural" problem is that the lawyer can herself violate the reporting law and subject herself to criminal punishment before the scope of the privilege can be determined. Most child abuse reporting statutes require a report to be made within a specified period,¹¹³ and failure to make disclosure during that period constitutes a completed crime, subjecting the lawyer to criminal punishment.¹¹⁴ Thus, unlike the typical ruling on attorney-client privilege, which occurs in the courtroom with a judicial officer making a ruling on the issue coincident with creation of the duty to report, no judicial ruling precedes the effective operation of law in cases involving suspected abuse.¹¹⁵

The most readily available mechanism for lawyer guidance—the states' ethics panels—will generally be unable to provide an effective answer. Ethics panels occupy an uncomfortable position. On the one hand, the Commentary to the Model Rules state that "a presumption should exist against" other law superseding

112. At a substantive level, the ethics rules add nothing to the analysis beyond that developed *supra* in Part II. If the privilege has been abrogated by legislative action through enactment of reporting statutes or if such disclosures cannot be protected because the attorney-client privilege does not apply to out-of-court disclosures, then the attorney is permitted under rules of professional ethics to disclose the information. In either situation, the reporting statute would constitute a superseding legal duty to reveal abuse that creates an exception to the ethical principle of confidentiality. However, if the attorney-client privilege remains applicable to client communications regarding child abuse, then the attorney has no legal duty to report and remains under the ethical imperative to maintain the confidence.

113. See, e.g., FLA. STAT. ANN. § 415.504(2)(a) (West 1986 & Supp. 1992) ("shall be made immediately"); IND. CODE ANN. § 31-6-11-4 (Burns 1987) ("shall immediately make an oral report"); MD. CODE ANN., FAM. LAW § 5-704(b)(1)(i) (1991) ("as soon as possible"); NEV. REV. STAT. ANN. § 432B.220(1) (Michie 1991) ("immediately, but in no event later than 24 hours after there is reason to believe that a child has been abused or neglected"); UTAH CODE ANN. § 62A-4-503(1) (1989) ("shall immediately notify").

114. See, e.g., FLA. STAT. ANN. § 415.513(1) (second degree misdemeanor); IND. CODE ANN. § 36-6-11-20(a) (class B misdemeanor); NEV. REV. STAT. ANN. § 432B.240 (misdemeanor); UTAH CODE ANN. § 62A-4-511 (1989 & Supp. 1992) (class B misdemeanor).

115. Given the apparently clear command that attorneys report child abuse, the situation is arguably different from that presented when the lawyer declines to provide the information in response to judicial order so that the issue may be litigated effectively. Cf. *Maness v. Meyers*, 419 U.S. 449 (1975) (lawyer may not be held in contempt for advising client in good faith to test Fifth Amendment issue by refusing to comply with a court order that may subject the client to contempt). In the area of child abuse, the desire to protect the health and welfare of the child may be held to require immediate disclosure and therefore not permit delay for the purpose of litigating the issue fully before disclosure.

the confidentiality principle.¹¹⁶ On the other, it recognizes that interpretation of whether another provision creates a superseding legal duty is beyond the scope of the disciplinary rules,¹¹⁷ and presumably beyond the authority of an ethics committee, to determine.¹¹⁸ A lawyer may be told, accordingly, that her failure to report suspected abuse will not subject her to disciplinary action by the bar—yet such a failure may constitute a criminal act.¹¹⁹

116. MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 25.

117. *Id.*

118. See Sobelson, *supra* note 82, at 729 (noting that the interpretation of questions of law is beyond the jurisdiction of ethics committees). In all likelihood, ethics committees that do interpret questions of law will be ignored. See, e.g., *In re Doe*, 456 N.Y.S.2d 312, 315-16 (Co. Ct. 1982) (in deciding whether to compel testimony from lawyer regarding client's whereabouts, court refused to be bound by decision of bar association ethics opinion regarding the confidentiality principle under rules of professional responsibility); *State v. Jones (In re Banks)*, 726 S.W.2d 515, 519 (Tenn. 1987) (upholding contempt conviction of attorney even though refusal to comply with trial court's order based on unambiguous command of ethics opinion; ruling that ethics opinions do not have force of law and are not binding on the courts, which may disagree with the opinions); see also Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1412 (1992) (the only instance in which courts are bound to treat ethics rules as binding precepts are in disciplinary proceedings against lawyers).

119. A recent North Carolina ethics opinion had difficulty in clearly defining the scope of the attorney-client privilege and as a result concluded that it was not unethical to report child abuse. N.C. State Bar Ethics Comm., Op. RPC 120 (July 17, 1992), reprinted in N.C. ST. B. NEWSL., Spring 1992, at 7 (revised proposed draft; for notification of approval, see N.C. ST. B. NEWSL., Summer 1992, at 7). The opinion also took the untenable position, at least from the perspective of the attorney, that not reporting was also an ethically satisfactory response that would not subject the attorney to professional discipline but might well result in a criminal conviction. *Id.*

Under these circumstances, it is hard to see why a lawyer will not report, given the threat of criminal prosecution if she does not do so. The incentive to report is particularly strong because disciplinary proceedings are rare for disclosures in violation of the confidentiality principle. See 24 WRIGHT & GRAHAM, *supra* note 64, § 5472, at 91-92.

The conclusion that lawyers will likely report once the existence of the reporting duty is made known is, of course, not self-evident. Many professionals are likely to have a deeply ingrained predisposition against disclosure of confidential information that may continue even in this context. Indeed, the experience with currency reporting requirements under 26 U.S.C. § 6050I (Supp. II 1990), see *supra* note 65, indicates that lawyers will sometimes vigorously resist compliance. My argument is that ordinary assumptions about confidentiality should not be expected to operate where the professional is personally threatened with criminal sanctions for maintaining secrets. This is particularly true where not only is the conduct involved morally reprehensible, but also there is a reasonable prospect that the conduct will ultimately be detected and some chance that the lawyer's knowledge of it will be discovered. Moreover, the typical client in the child abuse context does not command the type of economic resources that could reasonably induce the lawyer to chance prosecution on the basis of an economic calculation that the risk is worth taking.

The lawyer is thus placed in an extremely vulnerable position¹²⁰ where both professional and personal self-preservation require disclosure. In recent years, courts and ethics panels have increasingly recognized the right of an attorney who is, or may become, the target of criminal or civil action to make disclosures of confidential information for self-protection.¹²¹ The real possibility of being charged with the crime of failing to disclose child abuse constitutes at least a comparable threat to the welfare of the lawyer.¹²² Therefore, absent a clear ruling from a state bar ethics committee that disclosure would constitute an ethics violation, reporting will almost certainly occur.¹²³

Moreover, disclosure may substantially harm the client's legal interests without an effective remedy even if it constitutes a violation of ethics rules or the attorney-client privilege. This is true if, in accord with the current majority position, such violations do not entail exclusion of derivative uses of the disclosure. For instance,

120. See, e.g., *In re Nackson*, 555 A.2d 1101, 1107 (N.J. 1989) (observing that it "takes no small measure of courage to stand alone before a grand jury and insist on upholding the requirements of the profession in the face of a contempt charge"); *Dike v. Dike*, 448 P.2d 490, 492 (Wash. 1968) (describing how the attorney upon refusing to answer the court's questions about his client's whereabouts on the basis of attorney-client privilege was handcuffed and jailed).

121. Cunningham, *supra* note 62, at 1042-43 (noting the expanding use of the exception to attorney-client privilege under a concept of attorney self-defense in recent years and observing that this exception gives incentive to prosecutors and plaintiffs to initiate action against a lawyer in order to obtain client confidences); see also 1 HAZARD & HODES, *supra* note 62, §§ 1.6:112, 1.6:306, 1.6:310 (observing that "required by law" provision or threat of criminal proceedings may create a situation where the lawyer discloses information as a method of self-defense).

The existence of a criminal penalty against the attorney for failure to reveal the information provides the same type of inducement to breach the privilege as a threatened civil or criminal action against the lawyer in the absence of such a reporting statute.

122. See Sobelson, *supra* note 82, at 758-61 (discussing recent attorney self-defense cases); Cunningham, *supra* note 62, at 1010-26 (same).

123. See 1 HAZARD & HODES, *supra* note 62, § 1.6:114, at 153-54 (characterizing pressures to reveal information as "virtually irresistible in practice" when lawyer threatened with jail for nondisclosure). Cf. Lefstein, *supra* note 58, at 925 (recognizing that in light of laws criminalizing tampering with physical evidence that may be applied to attorneys who receive physical evidence from their clients, attorneys may believe that they must always disclose such evidence to authorities to avoid criminal prosecution). See also *supra* note 119.

Given the lack of authority of ethics panels to bind courts, see *supra* note 118, even a clear ruling may not be sufficient to guarantee that disclosures will not be made. Indeed, reliance on ethics opinions does not necessarily protect the lawyer even against professional discipline, although it will typically induce the disciplinary authority as a matter of discretion not to prosecute or to mitigate substantially any sanction imposed.

whereas the lawyer may be barred from testifying as to the communication because it was protected by either ethics rules¹²⁴ or the attorney-client privilege, the lawyer's identification of the defendant and the victim and information obtained through investigation of leads may not be suppressible.¹²⁵ Thus, although the drafters of the mandatory child abuse reporting statutes may not have intended to reshape the attorney-client privilege, the mere existence of these statutes, which raise questions regarding the continued protection of the privilege, has an important impact upon how the ethics rules that might otherwise preclude disclosure are applied.

B. Reporting Abuse Based on the Possibility or Probability that a Client Will Commit a Future Crime

Both the attorney-client privilege and ethics rules permit some disclosure when a client contemplates commission of a future crime or fraud. Although responding to basically similar concerns, these exceptions differ somewhat in scope. An examination of the

124. Whether violation of an ethics rule is ever grounds for suppression of evidence offered by the prosecution is unclear. *See* *Suarez v. State*, 481 So. 2d 1201, 1206-07 (Fla. 1985) (suppression of statements taken from client represented by attorney in violation of disciplinary rule not justified because disciplinary action against attorney who violated rule provides satisfactory remedy), *cert. denied*, 476 U.S. 1178 (1986); *People v. Green*, 274 N.W.2d 448, 454-55 (Mich. 1979) (violation of disciplinary rule regarding contact with individual represented by counsel only through that party's counsel should be handled by disciplinary action rather than suppression); *Pannell v. State*, 666 S.W.2d 96, 98 (Tex. Crim. App. 1984) (because disciplinary rule does not constitute law of state, violation of rule will not bar introduction of evidence). *But see* *United States v. Hammad*, 858 F.2d 834, 840-42 (2d Cir. 1988) (suppression may be an available remedy for violation of ethics rule prohibiting contact by lawyer with a party represented by counsel without the consent of that party's counsel), *cert. denied*, 111 S. Ct. 192 (1990); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) (same), *cert. denied*, 412 U.S. 932 (1973).

125. One commentator suggests there may be a basis for suppression in that the state, through the command of its statute, is directly involved in causing the initial disclosure. Subin, *supra* note 74, at 1104 n.79, 1126-27 (although it is unclear that exclusionary rule should apply to a voluntary breach of privilege by an attorney because of lack of state involvement, its application is easier when disclosure is produced by mandatory duty). *But cf. supra* note 88 (authorities discussing general inapplicability of doctrine suppressing derivative uses of violation of evidentiary privilege). However, even if some "fruits" of the illegality are suppressed, the scope of the "fruits" doctrine is unlikely to be broad or powerful enough to exclude results of investigative leads, exclusion of which would have the practical effect of immunizing the criminality. *Cf. United States v. Crews*, 445 U.S. 463, 475 (1980) (preexisting ability of victim to identify the defendant cannot be suppressed as the fruit of defendant's illegal arrest).

differences helps explicate the doctrines and sets the stage for later observations.

The attorney-client privilege has long recognized a "crime-fraud" exception. Although its precise dimensions are in some dispute,¹²⁶ the core of the "crime-fraud" exception is that "the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud."¹²⁷ The exception to the ethical confidentiality principle is in many jurisdictions much broader, permitting¹²⁸ or requiring¹²⁹ disclosure of "[t]he intention of his client

126. For a history of the somewhat circuitous early development of the crime-fraud exception, see Fried, *supra* note 64, at 446-61, and Hazard, *supra* note 72, at 1061-91.

Two early cases establish some of the core elements of the exception. The first is *Annesley v. Earl of Anglesea*, 17 HOWELL'S STATE TRIALS 1139 (1743). The decision in *Annesley* rested on the unexceptional proposition that discussion regarding an illegal purpose fell outside the privilege because in the context of the case it was not a communication directed at obtaining legal advice for which the lawyer had been secured. The client's statements were made to the lawyer not in the capacity of a lawyer but as a friend. *Id.* at 1239-40. Thus, the case, while in fact concerning a contemplated crime, did not necessarily rest on that fact but a more general limitation on the privilege still followed today.

The second case, *The Queen v. Cox & Railton*, 14 Q.B.D. 153 (1884), much more clearly established the proposition that consultation for the purpose of perpetrating a crime is outside the privilege. The court stated:

In order that the rule [attorney-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.

Id. at 168.

127. 1 MCCORMICK ON EVIDENCE, *supra* note 47, § 95, at 350.

128. See, e.g., IND. RULES OF PROFESSIONAL CONDUCT 1.6(b)(1) (1992); MASS. CANONS OF ETHICS & DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 4-101(C)(3) (1992); N.C. RULES OF PROFESSIONAL CONDUCT 4(C) (1992). These states continue to adhere to the formulation of the Model Code as opposed to the much more narrow exception in the Model Rules, the latter permitting disclosure only of extremely serious future crimes. See *supra* note 106.

129. Florida requires disclosure of information believed necessary to prevent a client from committing any crime. RULES REGULATING FLA. BAR 4-1.6(b)(1) (1992) ("A lawyer shall reveal such information to the extent the lawyer believes necessary: . . . [t]o prevent a client from committing a crime . . .") (emphasis added). Nevada, New Jersey, and Wisconsin also require disclosure of confidential information limited to more serious crimes, making disclosure mandatory when the lawyer "reasonably believes" disclosure is necessary to prevent the client from committing a crime involving death or serious bodily injury. NEV. SUP. CT. R. 156(2) (1992); N.J. RULES OF PROFESSIONAL CONDUCT

to commit a crime and the information necessary to prevent the crime."¹³⁰

The two exceptions differ in one key respect. For a communication to fall within the "crime-fraud exception" to the attorney-client privilege, the client must consult the attorney with a purpose of furthering a future crime or fraud. The intention of the client to misuse the lawyer's services is both a necessary and a sufficient condition to void the privilege.¹³¹ However, if the lawyer also supports the evil purpose, an additional justification for disclosure arises. The policies of the privilege do not support protection for lawyer-client communications when the lawyer is participating in a criminal conspiracy or lending aid to the commission of a wrong.¹³²

In contrast, the exception to the ethics rule applies when the lawyer learns of the client's intention to commit a future crime or fraud, regardless of whether the client sought to use the lawyer's aid in the venture.¹³³ No improper use of the lawyer's services is

1.6(b)(1) (1992); WIS. SUP. CT. R. 20:1.6(b) (1991).

130. MASS. CANONS OF ETHICS & DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 4-101(C)(3) (1992).

Obviously some child abuse may threaten serious bodily harm and even death. Indeed, the limitation to serious future crimes probably has little necessary impact in the child abuse area with respect to substantial instances of abuse. Courts or ethics panels can, without distorting the words beyond their reasonable meaning, define the impact of abuse, whether involving physical trauma or sexual exploitation with its accompanying psychological damage, as constituting serious injury to these particularly vulnerable victims. See RUTH F. THURMAN, CLIENT INCEST AND THE LAWYER'S DUTY OF CONFIDENTIALITY 17 (1985) (setting out argument for incest as substantial injury); Indianapolis Bar Ass'n Legal Ethics Comm., Op. 1-1986 (Apr. 29, 1986) (noting that child abuse: (1) typically is repetitive and that repeated abuse raises the likelihood of serious injury or death; (2) may be gravely damaging to emotional health; and (3) can lead to other serious physical conditions and psychological disorders).

131. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1511 (1985) (test generally derived from Justice Cardozo's opinion in *Clark v. United States*, 289 U.S. 1, 15 (1933)); see also *Clark*, 289 U.S. at 15 ("The privilege takes flight if the relation [between attorney and client] is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.").

132. The lawyer here is not acting as part of the adversary system, as she is when defending past crime, and can receive no justification from that system. The lawyer is simply a criminal, and the law denies the privilege in part to add to the risk that the lawyer must take into account in joining the illegal venture. WOLFRAM, *supra* note 71, § 6.4.10, at 279.

133. This exception to the confidentiality rule incorporates two important principles of American law regarding confidentiality. First, it exempts from protection statements in furtherance of a crime, and second it draws a distinction between past and future crime.

required, and certainly no participation by the lawyer in the impropriety is necessary. Instead, confidentiality is denied to prevent crimes or other wrongs known to the lawyer before their commission.¹³⁴ In one respect, the broader exception under the ethical confidentiality principle makes absolute sense: Because the ethical principle is much broader than the privilege, protecting information obtained from both the client and various other sources, its protections for at least some information should be swept away when it conflicts with the important social goal of avoiding a future wrong.

Application of the "future crimes" exception to the ethical confidentiality principle to the reporting of abuse is both complicated and interesting. An example may help to illustrate the intricacy of its application to child abuse.

A lawyer learns in the course of discussion with a male client, who is involved in a divorce action, that the client has had disagreements with his wife, which are in part related to the client's treatment of the couple's children. Under local law the facts related to that dispute may affect the amount of support payments and the custody of the children. The client states that his wife believes he physically, (or sexually) abused one of the young children, who cannot because of her tender years recount accurately what transpired. The client acknowledges the abuse but assures the lawyer that it occurred only once (or rarely) and then under extenuating circumstances. Furthermore, he adamantly insists that he will never repeat this conduct.¹³⁵

Sobelson, *supra* note 82, at 738.

134. As the Ethics Committee of the New York State Bar put it, "[t]he future crime exception recognizes both the possible preventability of the crime, as well as the total absence of any societal need to encourage criminal clients to make such disclosures to their lawyers." N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 479 (1978), *reprinted in* N.Y.L.J., Mar. 7, 1978, at 24.

135. This example can be made somewhat stronger by adding further admitted instances of abuse. However, rarely, if ever, is a client likely to admit directly to the attorney that abuse will occur again, so that uncertainty of intent will be a constant factor in these cases. Indeed, in most cases, the client is more likely to deny ever committing the abuse in the first instance, and it is likely to be the lawyer's investigation, rather than the client's own statement, that leads to the belief that abuse occurred. No attorney-client privilege exists in such situations as to third-party information, however. Whether such "confidential information" was subject to disclosure might be a difficult question under the exception to the ethical confidentiality principle for future crime, but the issue is easily resolved under the requirements of a child abuse reporting statute. The reporting statute clearly constitutes a superseding legal duty that overrides ethics rules, and the lawyer must report. *See supra* Section III(A).

It is important to observe that the client makes no admission that he intends to commit a future crime. Instead, the "future crimes" exception can be applied only by inferring from past criminality that future wrongdoing will occur. Moreover, providing information necessary to prevent future crime will often, if not always, require revelation of past events. However, when revelations relate to past crime, the protection of the privilege is the clearest, and the exception to the ethics rule is inapplicable. Indeed, some commentators argue that, because revelation of past crime cannot be tolerated under ethics rules, the obligation to reveal inseparable future crime is eliminated.¹³⁶ However, although the prospect of revealing past crime should make the analysis a much more sensitive one, it does not trump all other concerns.

This issue remains in doubt because the authorities do not uniformly prohibit reporting past crime as a byproduct of disclosing future criminality,¹³⁷ and ethics rules explicitly create no absolute prohibition in this context. Moreover, the reality outside the field of professional ethics is that, because of the nature of some types of child abuse, a prediction of future criminality can in fact be based on information regarding past conduct.¹³⁸

136. See Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URBAN L.J. 11, 17-18 (1985) (making argument with respect to possession of proceeds of crime that the prevalent and better view is that an attorney may not reveal continuing crime because it necessitates disclosure of past crime, which is prohibited by ethics rules); Callan & David, *supra* note 64, at 362-65 (acknowledging that issue is not free from doubt but arguing that "appropriate and prevailing" view is that attorney need not and should not reveal continuing aspects of past criminal conduct); Sobelson, *supra* note 82, at 751-52 (arguing that reporting not proper when revealing future conduct may disclose confidences relating to past conduct); see also *In re Nackson*, 555 A.2d 1101, 1105 (N.J. 1989) (citing Callan & David argument with approval on question of knowledge of client's whereabouts).

137. See, e.g., Md. State Bar Ass'n Comm. on Ethics, Op. 83-60 (Apr. 28, 1983) (authorizing lawyer to reveal information regarding client who was abusing child and whom lawyer believed would continue to do so in the future); see also Stuart, *supra* note 78, at 253 (arguing for an interpretation of ethics rules that permits reporting the continuing and future crime of child abuse).

The authorities prohibiting revelation typically involve a true continuing crime, such as possession of proceeds of crime or contraband, where no new criminal conduct will be committed in the future. The predominant consequence of reporting the crime is the revelation of past conduct, not the prevention of a future, additional wrong. Child abuse, in contrast, if it will indeed occur in the future, constitutes a very serious additional social harm that renders the strongest precedent opposing disclosure arguably inapposite.

138. THURMAN, *supra* note 130, at 23 (accepting modern medical and social scientific

Initially, it is critical to note that child abuse is not a continuing offense, although sometimes loosely and incorrectly described as such.¹³⁹ Instead, child abuse is a repetitive crime. The similarity to a continuing offense arises from the substantial likelihood of repetition that arguably may warrant disclosure under the "future crimes" exception to the confidentiality principle. The fact that abuse does not constitute a true continuing offense makes the inquiry under the "future crimes" exception much more difficult. When an offense is continuing, the lawyer can have no certainty that she has sufficient knowledge that the client will commit a crime because of the difficulty inherent in predicting future human conduct. In contrast, where an offense is repetitive, the prediction of future criminality is itself both critical and problematic.¹⁴⁰

The degree of knowledge necessary to justify disclosure of future criminality has been a very troublesome issue for the drafters of ethics rules,¹⁴¹ and not surprisingly, different knowledge

data that child abuse often occurs in a recurring pattern as part of argument for permissive disclosure of sexual abuse by parent who has persisted in abuse over a period of time); see also Besharov, *supra* note 22, at 478 (arguing broadly that child abuse and neglect would fall under future criminal activity exception as "a course of conduct"); *infra* note 156 (discussing battered child syndrome).

139. See, e.g., Stuart, *supra* note 78, at 253 (stating that child abuse is both a continuing and a future crime).

140. Another important impact of the distinction between a completed and a continuing offense is that there is no duty to report a fully completed crime. See *In re Nackson*, 555 A.2d 1101, 1105-06 (N.J. 1989).

141. Under the Model Code, a lawyer is permitted to disclose information about the client's intention to commit any crime and the information necessary to prevent it. MODEL CODE, *supra* note 17, DR 4-101(C)(3). The wording of the standard, which on the one hand focuses on the client's intention to commit crime but also refers to the steps necessary to prevent it, makes it unclear what the lawyer needs to "know" with regard to the likelihood that the crime will take place beyond the client's intention to commit it. A footnote added to the Code by way of commentary unfortunately increases the confusion, suggesting that a lawyer is *required* to disclose if she has knowledge beyond a reasonable doubt that the crime will be committed. *Id.* DR 4-101 n.16. It has been suggested, however, that if the standard of knowledge is beyond a reasonable doubt, then lawyers will be encouraged to evade it under a claim that a lawyer can never have such knowledge, as that determination is only for a jury or judge. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 51-58 (1975); 1 HAZARD & HODES, *supra* note 62, § 1.6:302, at 165 n.1.

The Model Rules in their final form, while narrowing the range of crimes to which reporting was even permitted to only the most serious, employ a "reasonable belief" standard, which is defined to mean "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." MODEL RULES, *supra* note 17, at 10. Although the drafting is not entirely clear on this issue, it appears that the "reasonable belief" standard applies to the likelihood that the illegal conduct will take

standards have been required by the courts and bar associations. Some authorities have demanded a relatively rigorous knowledge standard to prevent erosion of the protections afforded to confidential communications.¹⁴² Others have been somewhat less demanding; one recent ethics opinion requires that the lawyer must conclude only that the future crime was "reasonably likely."¹⁴³

Regardless of the standard of knowledge used,¹⁴⁴ all types of

place. *See Hodes, supra* note 82, at 807 (noting lax draftsmanship on the Final Draft, which did not change on this point before final adoption, resulting in language that "says nothing" about knowledge or belief that the conduct will take place).

The Commentary, however, appears to speak clearly on the point as follows:

The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 23.

142. *See, e.g., United States v. Del Carpio-Cotrino*, 733 F. Supp. 95, 99 (S.D. Fla. 1990) ("The actual knowledge standard is necessary to prevent unnecessary disclosure of client confidences and to protect the fiduciary nature of the attorney-client relationship.").

143. Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990) (giving lawyer discretion to reveal facts regarding client's past conviction related to child abuse, considered confidential information, if lawyer concludes it is reasonably likely that client, who has taken a new job caring for disturbed young children, would commit a crime against children in his care).

In its rule, Wisconsin requires revealing "such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal . . . act," but limits this reporting to very serious crimes "that the lawyer reasonably believes [are] . . . likely to result in death or substantial bodily harm" (and to similarly serious frauds). WIS. SUP. CT. R. 20:1.6(b). This is a modified, mandatory version of the Model Rules formulation and relies on the same definition of the term "reasonably believes" contained in the Rules, i.e., "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." MODEL RULES, *supra* note 17, at 10. Reasonable belief as to the likelihood of the client actually committing the crime rather than anything approaching actual knowledge is the operable standard.

This standard was applied by the Wisconsin Bar Committee on Professional Ethics to child abuse. The ethics committee concluded that if the lawyer "reasonably believes" that the abuse will continue, the lawyer is obligated to report information regarding a client to prevent the commission of a crime involving likely substantial bodily or emotional harm. WIS. STATE BAR COMM. ON PROFESSIONAL ETHICS, Formal Op. E-88-11 (Dec. 7, 1988).

144. If child abuse reporting laws are held to constitute a superseding legal duty under the "required by law" exception to the ethical principle, questions about the quantum of proof under the "future crimes" exception become largely moot. Under the reporting laws a much lower standard of proof would produce direct disclosure of the past conduct upon which the fear of future criminality was based. Mandatory reporting duties are triggered when an individual has "cause to suspect," N.C. GEN. STAT. § 7A-543 (1989), "reasonable suspicion," N.M. STAT. ANN. § 32-1-15(A) (Michie 1989), or "reasonable cause to believe," N.J. STAT. ANN. § 9:6-8:10 (West 1976 & Supp. 1992), that abuse has occurred. *See generally Besharov, supra* note 22, at 471 (discussing the import of such

child abuse should not be treated identically under the "future crimes" exception.¹⁴⁵ Some conduct constituting abuse under often exceptionally broad statutory definitions, which may include any non-accidental injury,¹⁴⁶ involves no special likelihood of repetition. Other conduct, in contrast, reflects either a special psychological propensity for the violent treatment of children or perhaps an even more powerful drive to commit sexual abuse.¹⁴⁷ In these latter situations, the level of probability may be sufficiently high to constitute a degree of knowledge of future criminal conduct authorizing disclosure regardless of the standard used. However, expert advice from the psychiatric/psychological community will often be necessary for a proper decision.¹⁴⁸ Moreover, such deter-

language, which he describes as ranging between unfounded suspicion and probable cause to believe, but contends is fundamentally equivalent and represents a quantum of proof something less than "probable cause").

145. Note, however, that if the exception to the ethical confidentiality principle comes from the theory that the reporting statutes create a superseding legal duty, then this inquiry is unnecessary. Past criminality is not being used to predict future crime; the fact of past criminality must itself be reported and that duty stands as an exception to the confidentiality principle.

146. See, e.g., FLA. STAT. ANN. § 827.04 (West Supp. 1992) (misdemeanor child abuse committed, *inter alia*, by knowingly or with culpable negligence inflicting physical or mental injury to child; felony child abuse requires great bodily harm, permanent disability, or permanent disfigurement); N.C. GEN. STAT. § 14-318.2, 318.4(a) (1986) (misdemeanor child abuse committed, *inter alia*, by infliction of physical injury by other than accidental means on child less than 16 years of age; felony child abuse requiring intentional infliction of serious injury); TEX. PENAL CODE ANN. § 22.04(a)-(g) (West Supp. 1992) (offense, *inter alia*, for intentionally, knowingly, recklessly, or with criminal negligence causing injury to child under 14 years of age, with severity of the penalty dependent upon abuser's mental state); see also DOUGLAS J. BESHAROV, COMBATING CHILD ABUSE: GUIDELINES FOR COOPERATION BETWEEN LAW ENFORCEMENT AND CHILD PROTECTIVE SERVICES 16-17 (1990) (dichotomy between criminal and noncriminal child abuse not a useful distinction in most states as definition of criminal child abuse very broad).

147. The Massachusetts ethics committee explicitly recognized the possible "compulsion" to commit crime in these circumstances. See Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990) (suggesting lawyer may believe that client "reasonably likely to be driven by compulsion to commit a crime similar to his past [criminal assaults on children]"). Cf. Indianapolis Bar Ass'n Legal Ethics Comm., Op. 1-1986 (Apr. 29, 1986) (noting that child abuser may frequently repeat offense as long as conditions and opportunities remain unchanged). For a discussion of the likelihood of repetition in child abuse cases, see *infra* notes 155-57 and accompanying text.

148. Indianapolis Bar Ass'n Legal Ethics Comm., Op. 1-1986 (Apr. 29, 1986) (advising consultation with social worker, psychologist, or other professional with training and experience in the area to assist in determining client's intent to commit future crime). The lawyer, however, must be careful in seeking this advice because almost any other expert will have no discretion regarding reporting if that expert gains sufficient information for "reasonable suspicion" to believe that abuse has occurred. See Op. Md. Att'y Gen. No.

minations cannot be reached categorically. They must instead be reached through careful examination of the circumstances of each case,¹⁴⁹ and even then, unfortunately, results will often be unclear.¹⁵⁰

With regard to child abuse, the determination that the client will commit a future crime is difficult not only because it is based entirely on past conduct without a statement of intent, but also because the disclosure required to prevent the future crime will frequently be unusual. Because the lawyer does not know of any specific planned criminal episode, the action required to prevent the crime will be quite general and potentially expansive in scope.¹⁵¹ In some cases, referral to the relevant social services

90-007 (Feb. 8, 1990) (clear duty of psychotherapist to report abuse requires reporting even when client consulted at request of lawyer except when consultation protected by Sixth Amendment after that right attaches when formal criminal charges have been filed). For a discussion of the implications of this statutory pattern for the lawyer's role in preventing crime by promoting treatment, see *infra* notes 179-87 and accompanying text.

149. See Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990) (determination whether future crime reasonably likely generally requires consideration of number of factors that are difficult to evaluate).

150. It is important to note that in this situation the lawyer is not operating under a threat of criminal prosecution for failure to report. Where criminal prosecution is threatened, I have argued that the incentives to report even marginal evidence of abuse are extremely strong. See *supra* note 123 and accompanying text. Which way uncertainty as to the lawyer's authority to reveal information will push the decision here regarding disclosure is less clear.

Several state ethics panels have taken the position that, because of the difficulty in predicting future crime, a lawyer making any reasonable judgment should be free from disciplinary action. Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 562, 1984 N.Y. ST. B.J. 54, 54-55; Wis. State Bar Comm. on Professional Ethics, Op. E-89-9 (May 24, 1989).

Civil sanctions for action or inaction present an additional concern. See Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990) (noting that separate from the disciplinary issue, lawyers might be subject to civil suit either for failing to warn potential victims if they did not disclose or for malpractice based on wrongful revelation of confidential information if they did disclose).

In the ordinary situation, how the lawyer's conflicting incentive would affect the decision to reveal or remain silent might be indeterminate. Lawyers might generally be assumed not to want to disclose the information out of a desire to please their clients. Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123, 139 (1988). This general conclusion may not, however, be accurate when the lawyer is appointed by the court to represent an indigent client and as a result the client is not paying the lawyer's fee and continued appointments will depend upon the judge's view of the lawyer's integrity.

151. This contrasts with other situations, in which the protective action may be care-

agency for either treatment or punishment will be sufficient. In others, prevention may require permanent removal of the client from the presence of a particular child or all children, which may mean in turn that the client must be incarcerated. In either situation, the lawyer must reveal what she knows about the past conduct in order to prevent future criminality; and revelations that are so explicitly backward-looking are unusual, if not unprecedented, as satisfying the ethical duty to thwart a future wrong.¹⁵² However, despite these difficulties, ethics panels in a number of jurisdictions have rather freely offered the "future crimes" exception as authorization for disclosure of a client's act of child abuse.¹⁵³

Once established, this precedent has substantial promise for application and misuse in other areas. For example, a legal aid attorney may learn that her client, who is facing eviction from his housing project for the burglary of a neighboring apartment, is addicted to drugs, is unemployed, and has committed similar burglaries to support his drug habit. Not only is the likelihood of that client's committing future crimes of the same type extremely high, but the conduct necessary to prevent such future crimes is as diffi-

fully targeted. For example, when confronted with a specific threat by a client to go into court in a half hour and kill the judge and two participants in the litigation, the opinion of the ethics committee rendered on an emergency basis was that the lawyer should alert security personnel to the danger of the attack without the need to disclose even the identity of the client. Pa. Bar Ass'n Comm. on Legal Ethics & Professional Responsibility, Inq. No. 90-28 (Feb. 23, 1990).

Sometimes in child abuse cases, a carefully tailored remedy will also be possible. For instance, an individual may be removed from employment giving him access to potential victims, particularly especially vulnerable ones. Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990) (individual previously convicted of assault on children discovered by his lawyer from earlier case in new employment caring for disturbed young children). However, the remedy will more typically require expansive action.

152. See *supra* note 136 and accompanying text.

153. In various contexts, reporting of future abuse based on past conduct has been authorized by the following ethics opinions: Indianapolis Bar Ass'n Legal Ethics Comm., Op. 1-1986 (Apr. 29, 1986); Md. State Bar Ass'n Comm. on Ethics, Op. 83-60 (Apr. 28, 1983); Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990); N.J. Advisory Comm. on Professional Ethics, Op. No. 280 (Supp.) (1974), *reprinted in* 97 N.J.L.J. 753, 753, 766 (1974); N.C. State Bar Ethics Comm., Op. RPC 120 (July 17, 1992) *reprinted in* N.C. ST. B. NEWSL., Spring 1992, at 7 (proposed revised draft; for notification of approval, see N.C. ST. B. NEWSL., Summer 1992, at 7); Wis. State Bar Comm. on Professional Ethics, Op. E-88-11 (Dec. 7, 1988).

cult to target precisely in this area as it is in the area of child abuse.

If the "future crimes" exception to the ethical confidentiality principle now under development in the child abuse field is to be effectively contained, courts and ethics panels should emphasize the helplessness of children as the justification for disclosure.¹⁵⁴ However, as a society, we may not want the exception to be so constrained. Other crimes, such as sexual assaults of adult females, may be driven by psychological forces as powerful as those that motivate some types of child abuse.

In specific, the likelihood of repetition varies between types of child abuse. Empirical research reveals that sexual abusers of young males, pedophiles, are far more likely to repeat their offenses than are sexual abusers of young females.¹⁵⁵ However, the likelihood of recidivism by pedophiles may still be lower than it is for offenders who commit aggressive sex crimes against adult females.¹⁵⁶ In any case, some categories of offenses against adults, specifically violent sexual offenses and offenses driven by various addictions, will have higher likelihoods of repetition than some

154. N.J. Advisory Comm. on Professional Ethics, Op. No. 280 (Supp.) (1974), reprinted in 97 N.J.L.J. 753, 753, 766 (1974) (treating child abuse as *sui generis* because of state's concerns for protection and custody of child and holding attorney-client privilege inapplicable, although opinion may rest on narrower ground that the facts known to the attorney "demonstrate[d] a propensity of that parent" to abuse the child and thus brought the case within the continuing crime or future crimes category); THURMAN, *supra* note 130, at 16-17 (basing the argument for mandatory disclosure of child sexual abuse under disciplinary rules on the helplessness nature of children at the hands of abusive parents and the overriding societal concern for the welfare and protection of children that must take precedence over confidentiality rules). Similar arguments are frequently accepted in cases involving child custody where lawyers are required to provide information on the whereabouts of their client. See, e.g., *Bersani v. Bersani*, 565 A.2d 1368, 1371-72 (Conn. Super. Ct. 1989); *Dike v. Dike*, 448 P.2d 490, 498 (Wash. 1968).

155. David Finkelhor, *Abusers: Special Topics*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE 89, 134 (David Finkelhor ed., 1986).

156. Indeed, evidence from two studies bears out this observation. See Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOLOGICAL BULL. 3, 13, 16, 27 (1989).

These studies cannot be taken to compare the two situations fairly, however. If the opportunity for sexual abuse continues unchanged, the number of repeated offenses involving the same children, because of their helplessness, should greatly exceed that for violent acts against different adults, who are likely to offer some resistance and as to whom each separate incident increases the chances of detection. Also, other types of child abuse, such as the "battered child syndrome," have as one of their distinguishing characteristics that they are not comprised of "isolated, atypical event[s] but [are] part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention." *Landeros v. Flood*, 551 P.2d 389, 395 (Cal. 1976) (citing C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 A.M.A.J. 17, 24 (1962)).

forms of child abuse.¹⁵⁷ Moreover, some of the offenses against adult victims will be indistinguishable from the most repetitive types of child abuse in that they too are motivated by quasi-involuntary psychological imperatives.

Thus, differentiating the predictability of repetition of child abuse from other crimes is not a simple proposition. This difficulty is not significant, however, if reshaping the ethics principles to aid in preventing and/or detecting some of these other highly repetitive crimes is the socially desired outcome. However, if the goal is not a general expansion of the "future crimes" exception, care must be exercised to limit its growth, even with respect to the appealing cause of preventing child abuse.¹⁵⁸

C. *The Interaction Between the "Future Crimes" Exception to the Ethical Principle of Confidentiality and the "Crime-Fraud" Exception to the Attorney-Client Privilege*

Because the "crime-fraud" exception to the attorney-client privilege requires an effort by the client to involve the attorney in the future crime, it is narrower than the "future crimes" exception to the confidentiality principle.¹⁵⁹ As a result, some disclosures otherwise authorized under the latter will presumably remain privileged because they also fall within the attorney-client privilege.¹⁶⁰

157. This observation is particularly true given the extremely broad statutory definition of child abuse used in many states. See *supra* note 146.

158. Any impact on the confidentiality principle here will stem from the loosening of ethical constraints rather than from statutory reporting requirements. Thus, issues raised by child abuse may have an eroding impact on the confidentiality of lawyer-client communications under both the "required by law" and the "future crimes" exceptions to the ethics rules.

159. See *supra* notes 131-34 and accompanying text.

160. Although these facts are voluntarily revealed by the attorney, disclosure would not constitute an act authorized explicitly or implicitly by the client so as to waive the privilege under general principles. 1 MCCORMICK ON EVIDENCE, *supra* note 47, § 93, at 341 (privilege belongs to client and only client or attorney acting with client's authority can waive it); WOLFRAM, *supra* note 71, § 6.4.4, at 271 (whether the lawyer can waive the privilege by disclosure is a question of implied authority).

Testimony would be excluded only under the attorney-client privilege, as disclosure in this circumstance by an attorney would likely not offend the constitutional right to effective assistance of counsel. See *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986) (threat to reveal client perjury did not constitute ineffective assistance of counsel because such disclosure would have comported with ethics codes and constituted reasonable lawyer conduct); Brent R. Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913 (1988).

Although the privilege would then prevent the lawyer from testifying,¹⁶¹ disclosure may still carry important consequences as evidence developed through use of the disclosure will likely be admissible.¹⁶²

The practical importance of the conceptual differences between these two exceptions is reduced, however, because courts construe the theoretically narrower "crime-fraud" exception broadly.¹⁶³ The expansive capacity of the "crime-fraud" exception is itself notable. Courts seem predisposed to conclude that lawyers who have received information regarding a future crime have aided the criminal enterprise. For example, a number of courts have found a duty to report the whereabouts of a fugitive client under a theory that the lawyer's conduct in other aspects of the

161. Indianapolis Bar Ass'n Legal Ethics Comm., Op. 1-1986 (Apr. 29, 1986) (disciplinary rule that allows lawyer to reveal confidences implicating past crimes in order to prevent future crimes does not also permit introduction of testimony regarding those past crimes); Subin, *supra* note 74, at 1159 (rules of professional conduct cannot contract the protection afforded by the attorney-client privilege); *see also* State v. Green, 493 So. 2d 1178, 1180-85 (La. 1986) (although weapon properly delivered to authorities under ethics rule was a physical object not protected by attorney-client privilege, authenticating information regarding client's possession of it was protected under attorney-client privilege).

162. Ethics panels examining such issues generally have not expressed an opinion whether the statement itself could be admitted into evidence, *see* authorities cited in note 153 *supra*, and judicial opinions do not appear to have examined the issue at all. The likely reason for silence on the point is that the only question presented to the ethics panels has been whether out-of-court disclosure is proper; in-court testimony was not contemplated. Nothing in the ethics opinions gives reason to assume that courts would rule the privilege, which conceptually should remain valid, automatically to have been lost because a future crime was contemplated.

While less common, a statement may fall outside the attorney-client privilege but within the confidentiality principle of ethics rules. Assuming that admission of an attorney's out-of-court statement does not violate the hearsay rule (as, for example, an admission of the lawyer as an agent, *see, e.g.*, FED. R. EVID. 801(d)(2)(C), (D)), the issue is not simply whether, as discussed earlier, derivative use of improperly obtained statements may be excluded. The question here is whether a court is authorized to suppress the attorney's statement itself containing the client's confidences as a remedy for violation of a rule of professional ethics. Ethics rules mandate only discipline of the attorney for their violation; suppression is a problematic remedy. *See supra* note 124.

163. The differences between the two exceptions are also narrowed for another reason. Many statements of future criminality that do not fit the "crime-fraud" exception are denied the protections of the attorney-client privilege on an alternative basis. Although the client may not have sought to enlist the attorney in the improper conduct, the statements themselves describing the future crime may fall outside the privilege as gratuitous communications unrelated to obtaining legal advice. This proposition is as ancient as it is uncontroversial. *See* Annesley v. Earl of Anglesea, 17 HOWELL'S STATE TRIALS 1139 (1743), discussed *supra* note 126.

case meant that she was aiding the fugitive to commit a crime by withholding the information.¹⁶⁴

The expansive capacity of the "crime-fraud" exception can be illustrated by another look at the hypothetical divorce action described earlier in this Part. Once the lawyer learns of the past abuse, virtually any effort by the attorney to maintain the client's access to his children can be viewed as involvement in the potential future abuse, for that access facilitates commission of the crime.¹⁶⁵ Thus, ethics rules and the attorney-client privilege could both be construed to allow disclosure once the client's prior conduct is deemed sufficient to establish an intention to commit future abuse.

164. See, e.g., *In re Doe*, 456 N.Y.S.2d 312 (Co. Ct. 1982) (lawyer seeking to withhold client's whereabouts while arguing that indictment should be dismissed for denial of speedy trial). That the lawyer aided the client in the illegality is more doubtful, but at least arguable, in some of the other cases requiring disclosure of the client's whereabouts. See, e.g., *Fellerman v. Bradley*, 493 A.2d 1239 (N.J. 1985) (attorney who helped negotiate judgment obligating client to pay certain costs could not then maintain the secrecy of his client's location when the client ceased payments). The courts' conclusions in other cases that the lawyer aided the client's wrongdoing reflect nothing more than the labelling of passive action as affirmative assistance. See *Commonwealth v. Maguigan*, 511 A.2d 1327 (Pa. 1986) (lawyer would become aider and abettor if he attempted to represent client while latter a fugitive and so must reveal information about client's whereabouts).

Some courts have created a similarly broad duty for voluntary disclosure of physical evidence delivered by a client to her attorney. See *Morrell v. State*, 575 P.2d 1200 (Alaska 1978). As with disclosing the whereabouts of a client, the duty to reveal the information is developed out of an expansive reading of the commands of the criminal law, such as a general prohibition against the concealment of evidence. *Id.* (it is not ineffective assistance of counsel to disclose evidence to prosecutorial authorities because taking possession of evidence from third party and keeping evidence would appear to constitute violation of criminal law). See generally Lefstein, *supra* note 58, at 918-21 (discussing implications of *Morrell* and similar cases); Kevin R. Reitz, *Clients, Lawyers, and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572, 584-613 (1991) (same).

165. A similar problem can arise when a lawyer, who is innocent of any initial wrongdoing, learns that a transaction on which she has done substantial work involves a fraud against the other party. See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L. REV. 271, 277-79 (1984) (discussing generally the problems with Model Rules' direction that lawyer learning of client's fraud should withdraw). Continued participation in the transaction would constitute assisting its accomplishment, giving rise to potential civil and criminal liability and professional discipline. *Id.*

IV. THE APPROPRIATE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE AREA OF CHILD ABUSE

A critical question, indeed probably the central question with regard to the scope of the attorney-client privilege in this area, concerns the justification for treating confidential communications with an attorney differently from communications with other professionals. Child abuse reporting laws have explicitly abrogated evidentiary privileges for most other professionals, and judicial decisions have firmly established that such abrogation effectively eliminates those professional privileges. Why should legislatures not treat the attorney-client privilege similarly?

Broadly speaking, two justifications are advanced for affording privileged status to attorney-client communications. The first and most widely argued is a utilitarian justification, which is the traditional justification for this and other privileges. The second is a non-utilitarian rationale, the major version of which is a rights-based argument, that in recent years has been gaining support among proponents of the attorney-client privilege as a more effective¹⁶⁶ or more easily argued¹⁶⁷ justification for the privilege.

166. However, the extreme claims of rights-based arguments are themselves subject to effective attack. Pizzimenti, *supra* note 82, at 448. For some commentators, the utilitarian argument remains potentially the stronger of the two justifications. See Bruce M. Landsman, *Confidentiality and the Lawyer-Client Privilege*, in *THE GOOD LAWYER* 191, 202 (Dayid Luban ed., 1983) (obligation to keep information confidential is stronger the more the systemic or utilitarian case can be made). Nevertheless, one explanation for the ascendance of the rights-based defense of the privilege is the perceived weakness of the utilitarian justification, particularly its empirical basis. 24 WRIGHT & GRAHAM, *supra* note 64, at 78-79 (noting that some writers favor non-utilitarian arguments because of belief that empirical basis for utilitarian rationale has not and cannot be proved). The utilitarian justification, unlike its rights-based counterpart, is vulnerable to such an attack because its propositions should be empirically verifiable.

For example, Professor Zacharias recently provided telling evidence of the weakness of the utilitarian approach. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989). He conducted two surveys of all lawyers and a pool of laymen in Tompkins County, New York, where Cornell Law School is located. *Id.* at 396. His study showed some support for the proposition that confidentiality encourages both use of attorneys and more complete disclosure by clients, but the effects were smaller than one might assume and did not support extreme claims for the privilege. *Id.* His study also showed a great deal of misunderstanding of the confidentiality rules by both lawyers and clients. *Id.*

While Professor Zacharias's study is not definitive, it highlights what most scholars had suspected all along: The empirical basis for the privilege is at least uncertain. Other studies involving both lawyers and other professionals also suggest this same weakness, although they do provide some support for a positive impact of the privilege on full disclosure. See, e.g., Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Em-*

pirical Examination of the Psychotherapist-Patient Privilege, 60 N.C. L. REV. 893 (1982); Weisberg & Wald, *supra* note 64, at 185-88 (describing study of psychiatric patients); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

Unfortunately, the empirical question, for which we have virtually no solid answers, is probably decisive for any utilitarian argument. Cf. Goode, *supra* note 65, at 313 (most arguments surrounding attorney-client privilege are based on unverified and probably unverifiable assumptions about the conduct of clients and lawyers that leave commentators free to make plausible although diametrically opposed claims about its real-world consequences). Even careful law and economics analysis reaches critical indeterminacy on the question of whether protection of confidentiality is desirable or undesirable in some fact patterns that can only be decided by data that do not exist. Shavell, *supra* note 150, at 142 & n.46 (intuitive reasons exist why more bad acts would be prevented by an obligation either to disclose or to maintain confidentiality).

However, even without definitive empirical evidence and based solely on general perceptions, anecdotal information, and logical analysis, it is hard to imagine that the privilege has no impact on producing more complete disclosures. Professors Hazard and Hodes state the apparently sound logical argument: "[I]t is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have at least some greater ability to gain the trust of at least some clients, and hence to serve them competently." 1 HAZARD & HODES, *supra* note 62, § 1.6:101, at 128. It is equally hard to conceive that the privilege is extraordinarily beneficial to any major social goal. There are a number of reasons unrelated to the privilege why lawyers and clients do not fully share information. For example, lawyers do not always want to know all the information a client may possess because full knowledge might limit the lawyer's hand since, for example, a lawyer cannot make arguments that otherwise would be reasonable if she learns that the argument is in fact false. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 103-04 (1985); Zacharias, *supra*, at 367 & n.69. Clients may withhold information not out of concern for further disclosure but because they fear embarrassment in the eyes of the lawyer or believe that a fully informed lawyer will not vigorously represent them. KENNEY F. HEGLAND, *TRIAL AND PRACTICE SKILLS IN A NUTSHELL* 206 (1978); see also MANN, *supra*, at 40-51 (white-collar crime clients may not provide full information because of lack of trust, embarrassment, concern with financial interest, and their own determination of proper legal strategy). Finally, on the positive side, many believe that one of the most important, if not the most important, reasons that clients reveal information fully is a feeling of trust in the attorney rather than any legal guarantee of confidentiality. Sobelson, *supra* note 82, at 705 n.6, 712.

167. Basing an argument on a rights-based rationale can be a very useful rhetorical device, at least as the argument is sometimes made. To claim that a position is necessary to ensure enjoyment of a right is often the equivalent of asserting that the position is beyond challenge. Cf. Robert Weisberg, *Forward: Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832, 835-37 (1985) (on criminal procedure issues, liberals use rights-based claim not only to dismiss cost-benefit analysis but to assert or assume the categorical nature of the right).

Whereas a utilitarian theory depends upon the possibility of comparative valuation of outcomes—the maximization of good for society—a rights-based argument denies that in determining what is right one searches for the best balance of good over evil. Instead one seeks conformity with a right, which itself is established by some system of valuation separately from its consequences. WILLIAM K. FRANKENA, *ETHICS* 16-17, 34-35 (2d ed. 1973). Thus, rights are independent values in a non-utilitarian system, and arguments in

These justifications are often treated as mutually exclusive although they may jointly provide support for privileges.¹⁶⁸

A. *The Utilitarian Justification*

The utilitarian argument posits that a privilege is important to the fostering of a confidential relationship that will promote full disclosure of information, which in turn will help achieve important social objectives.¹⁶⁹ For the attorney-client privilege, two social objectives are identified: (1) achieving a just outcome in the legal matter being handled by the attorney, and (2) allowing the attorney to learn of contemplated improper actions by the client and, having that knowledge, to encourage the client to comply with the law.¹⁷⁰

terms of rights do properly dismiss the significance of evaluation of the good to society produced by the practice at issue.

However, the claim that a position is supported by a right does not properly eliminate careful analysis about the validity of that position. The origins and dimensions of the right should be fully developed. More significantly, problems of relative valuation are not eliminated. One must be prepared to determine when the right asserted is overridden by some other equal or more basic right. Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177, 194-95 (1985).

168. See 24 WRIGHT & GRAHAM, *supra* note 64, at 77 (contending that throughout entire modern history of privilege courts and commentators have used both justifications for the privilege, although each tended to emphasize only one of the rationales); *Developments in the Law*, *supra* note 131, at 1504-09 (arguing that the two justifications can be combined).

169. To this point in the argument, all privileges follow the same general form under the utilitarian argument. However, from this point forward, they differ in the good that each privilege theoretically promotes.

170. This second justification is succinctly set out in the commentary to the Model Rules:

[T]o the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 23.

The objectives pursued under a utilitarian rationale are not necessarily limited to the two set out above, although these are clearly the two goals traditionally identified for the attorney-client privilege. Maximization of good in society could also be enhanced by the pursuit of other goals, including the protection of individual autonomy, which is often identified as the right supporting a rights-based rationale for the privilege. If the objectives of the utilitarian rationale are so expanded, one can narrow the distinction between that rationale and a rights-based rationale. However, the distinction is not totally eliminated because the rights-based argument claims an independent imperative for its goal rather than cumulating and comparing the total good across society. See *supra* note 167.

The argument that protecting lawyer-client confidences promotes just outcomes, as opposed simply to personally favorable ones, requires two debatable premises. First, it requires faith in our adversary system, which depends on the idea that truth will be best found by two parties each effectively pursuing their individual claims¹⁷¹ and that fully informed legal experts (lawyers) are important to the system's efficient and fair operation.¹⁷² Second, and more important, the argument requires a belief that the facts giving rise to legal disputes and the implication of those facts are sometimes ambiguous, and that people with potentially valid claims may be hesitant to consult lawyers or confide in them fully, particularly about facts that are personally embarrassing and/or viewed as potentially legally damaging.¹⁷³ Indeed, the battle line

171. In *United States v. Cronin*, 466 U.S. 648 (1984), the Supreme Court reiterated this item of faith as applied to the criminal system: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* at 655 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

The most notable advocate of this position is Monroe Freedman. See FREEDMAN, *supra* note 141, at 1-8. The view, however, has its critics, particularly in its extreme form that opponents deride as taking on almost religious overtones. See generally Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

172. Professor Graham presents this aspect of the argument effectively, noting the complexity of the law as applied to modern society, the mysteriousness of law to laymen, and the unequal distribution of skill in presenting a legal case, which would place the shy and unsophisticated party at a disadvantage without help from a professionally trained legal expert. 24 WRIGHT & GRAHAM, *supra* note 64, § 5472, at 81.

The United States Supreme Court frequently reiterates elements of this argument. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court noted the complexity of regulatory legislation as applied to even a relatively sophisticated corporate client and recognized the need for legal advice "since compliance with the law in this area is hardly an instinctive matter." *Id.* at 392. In *Fisher v. United States*, 425 U.S. 391 (1976), the Court observed that in the absence of privilege, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Id.* at 403.

173. 1 MCCORMICK ON EVIDENCE, *supra* note 47, § 87, at 314; 8 WIGMORE, *supra* note 16, § 2291, at 552; Zacharias, *supra* note 166, at 366.

An example in criminal litigation is provided by the client who claims self-defense with respect to a fatal stabbing. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1479-80 (1966). When counsel asks the client whether he usually carries the knife that inflicted the fatal wound or whether he only had it on the night of the encounter with the decedent, how *should* the client answer the question? The client may wonder whether it is worse to be the type of person who usually carries a knife or to have had it only that night. In the eyes of the law, having the knife solely on the fateful occasion supports an inference of premeditation. *Id.* The "correct" answer should, however, be unclear to

for the debate of the social value of the privilege is often drawn by the detractors at the relative infrequency of clients with valid claims who are reticent to provide critical information, as opposed to the number of invalid claims made more possible by the cloak of secrecy.¹⁷⁴

The argument that facts may be ambiguous and embarrassing has obvious application in the child abuse area. During litigation over the breakup of a marriage, lawyers frequently encounter accusations of child abuse. Even the implication of child abuse interjected into a divorce case could be a critical factor in the outcome of both financial and custody issues, and the impact would be particularly powerful if the damaging information came by way of a required disclosure from the party's own lawyer. Thus, it is easy to see how a lawyer's duty to reveal even a "reason to suspect" child abuse might inhibit the client's candor in describing unconventional treatment of his children.¹⁷⁵

In addition to supporting just outcomes, the utilitarian rationale also promises a second and even more appealing social objective. A client's total candor provides the opportunity for the lawyer to counsel compliance with the law.¹⁷⁶ Indeed, this notion is well established and broadly recognized, with even Justice Rehnquist accepting it as a basic foundation of the privilege.¹⁷⁷ On the other hand, although this social objective is the basis of some of the most vigorous defenses of a virtually absolute privilege,¹⁷⁸ it also has many skeptics.¹⁷⁹

many clients, and it is not at all certain that a client who truly believes that he acted in self-defense but fears that his story will not be accepted will give the attorney the unvarnished truth.

174. Zacharias, *supra* note 166, at 366-67.

175. As discussed above, however, disclosure in this situation may be required, even without a fundamental reexamination of the justification of the attorney-client privilege under the crime-fraud exception to the privilege in its expansive application. See *supra* Section III(C). When the lawyer knows of past abuse and keeps that information secret while successfully maintaining visitation rights, that action makes the commission of the crime of abuse more likely and the "crime-fraud" exception may apply.

176. See Zacharias, *supra* note 166, at 369.

177. *Upjohn v. United States*, 449 U.S. 383, 392-94 (1981).

178. MODEL RULES, *supra* note 17, Rule 1.6 cmt. at 23; Rhode, *supra* note 171, at 613 n.89; see also Landsman, *supra* note 166, at 208 (recognizing this objective as potentially "a powerful argument").

179. See, e.g., Rhode, *supra* note 171, at 615 (commenting that "little is known about the extent to which lawyers have managed to channel patrons along 'proper paths'"); Simon, *supra* note 171, at 1142 n.129 (deeming argument "not very impressive"); Zachari-

This debate about the effectiveness of confidentiality in helping to prevent future wrongdoing is largely beside the point, however, when it comes to reporting requirements for child abuse. Most state legislatures have rejected arguments by other professionals to preserve privileges when the confidential communications concern potential child abuse, mandating that child abuse should be revealed even at the expense of treatment of the abuser, which arguably provides the best hope of avoiding future crime. For example, psychiatrists have consistently been required to reveal legally damaging information provided to them by the perpetrators, even when it was revealed during voluntary therapy.¹⁸⁰ The statutes represent either a strongly punitive view—violators must be punished—or at least a determination that the state's child protective service officials and prosecutors, rather than indi-

as, *supra* note 166, at 369, 389 (noting both scholars' skepticism regarding the frequency with which misconduct is prevented and recounting equivocal empirical support by lawyers responding to his survey).

180. In *State v. Fagalde*, 539 P.2d 86 (Wash. 1975), the court concluded that there was no psychiatrist-patient privilege where a parent revealed abuse in the course of seeking treatment. The court observed that according

[s]uch protection might well be deemed to be in the public interest. But it is evident that, in its recent enactments, the legislature has attached greater importance to the reporting of incidents of child abuse and the prosecution of perpetrators than to counseling and treatment of persons whose mental or emotional problems cause them to inflict such abuse.

Id. at 90; see also *People v. Cavaiani*, 432 N.W.2d 409, 410-12 (Mich. Ct. App. 1988) (in case upholding prosecution of psychologist for failing to report statements made during therapy with victim and her family, court recognized the family members' collective desire to seek treatment for offender rather than initiating criminal proceedings not honored by legislation); *In re M.C.*, 391 N.W.2d 674, 676 (S.D. 1986) (mother's psychotherapist permitted to testify over argument that the privilege should be abrogated only as to statements made by victim). Cf. *State v. Ethridge*, 352 S.E.2d 673, 677-78 (N.C. 1987) (deeming statement to doctor regarding father's sexual contact with children admissible even though made as part of treatment for sexually transmitted disease after charges had been filed and rejecting argument that disclosure would deter naming of sexual contacts because legislature opted for broadest possible exception to privilege and sought to facilitate prosecution of child abusers).

vidual professionals,¹⁸¹ must determine whether treatment or punishment is appropriate.¹⁸²

A few states, however, have maintained privileges for certain other professionals, such as clergy and therapists.¹⁸³ In those

181. Douglas Besharov, the leading advocate and scholar in the field of child abuse legislation, has long supported an approach that would mediate between effective reporting and maintaining treatment relationships. His approach would require reports from therapists when abuse is disclosed during ongoing therapy but would authorize child protective agencies to decline further investigation upon determination that current treatment was satisfactory. The approach attempts to maximize the potential benefits from continuing an existing relationship while ensuring overall control by responsible public officials. BESHAROV, *supra* note 26, at 49; Besharov, *supra* note 22, at 478-80. This approach was incorporated into the 1977 draft of the Model Child Protection Act developed by the National Center on Child Abuse and Neglect, of which Besharov was then the director. See MODEL CHILD PROTECTION ACT, *supra* note 32, at 7, 49.

To date, however, only Nevada, which also excludes attorney-client confidences from reporting requirements, *see supra* note 44, has adopted such legislation. NEV. REV. STAT. ANN. § 432B.320 (Michie 1991). Given the public demand for vigorous enforcement in this area, the failure of Besharov's proposal to attract support may be the result of its lack of toughness.

182. Indeed, the very motivation for requiring reporting to child protective service agencies is the belief that such agencies have the capabilities and the judgment to determine who can best treat children. Besharov, *supra* note 22, at 464 (purpose of reporting is for individuals observing possible abuse, including professionals, to begin the child protective process so that the police or a child protective agency can become involved, provide emergency protective services if necessary, and develop a treatment plan).

In the same vein, most states list as the first purpose of their reporting statutes the protection of children, and they require identification of abused children as a way of achieving that protection. YOUNES, *supra* note 15, at 3 ("identification equals protection"); *see, e.g.*, R.I. GEN. LAWS § 40-11-1 (1990) ("The public policy of this state is: to protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the mandatory reporting of known or suspected child abuse and neglect . . ."); TENN. CODE ANN. § 37-1-402(a) (Michie 1991) ("The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists. It is intended that, as a result of such reports, the protective services of the state shall be brought to bear on the situation to prevent further abuses, to safeguard and enhance the welfare of children, and to preserve family life. This part shall be administered and interpreted to provide the greatest possible protection as promptly as possible for children.").

183. Among the twenty-two states that have reporting statutes applicable to attorneys, *see supra* note 40 and accompanying text, four protect the clergyman-penitent privilege. KY. REV. STAT. ANN. § 620.050(2) (Baldwin 1991); OR. REV. STAT. § 418.750 (1985); UTAH CODE ANN. § 62A-4-503(2) (1989); WYO. STAT. ANN. § 14-3-210(a)(ii) (1986). One of these, Oregon, protects psychologists and psychiatrists as well. OR. REV. STAT. § 418.750.

states, preserving the attorney-client privilege to encourage compliance with the law may be consistent with the policy judgments of the legislature. However, in states that have abrogated other privileges, and even in states that continue to recognize some privileges but require psychotherapists to report abuse, it is difficult to justify preservation of the attorney-client privilege to encourage compliance with the law.¹⁸⁴

While it is not clear that any group of professionals knows how to treat child abusers successfully,¹⁸⁵ psychotherapists at least have a treatment regimen that holds some hope for changing behavior.¹⁸⁶ Lawyers by contrast cannot claim any special ability to induce legal behavior through therapeutic conversation; indeed, preservation of the privilege is inconsistent with intuitively the most promising move by an attorney—the threatened exposure of confessed abuse if the client does not take steps to reduce the

Recognition of the clergyman-penitent privilege may, however, rest more on deference to religious freedom than on a determination that effective treatment should not be deterred by piercing the privilege. See Mitchell, *supra* note 22, at 776–77, 818 (arguing that constitutional right to free exercise of religion provides a unique and powerful justification for the clergyman-penitent privilege).

184. The argument in favor of preserving the psychotherapist-patient privilege would appear to be far stronger than that for attorneys. For example, a psychiatrist may determine based on expert knowledge that a child would benefit more from rehabilitation of the abuser than from his incarceration. Coleman, *supra* note 79, at 1121; see also Patton, *supra* note 91, at 495–96 (arguing that rehabilitation and family reunification are often preferable for the interests of child and society than prosecution of offender). Although certainly not infallible, this judgment and the treatment provided should logically be far more helpful than any action most lawyers can take to promote compliance with the law, other than perhaps an act antithetical to the privilege—helping to prosecute the perpetrator. Moreover, the need for psychotherapist-patient confidentiality would appear just as great or greater under any utilitarian theory, as candor regarding embarrassing information is critical to effective treatment. See generally Coleman, *supra* note 79, at 1122–35. Nevertheless, the vast majority of reporting statutes do not exempt psychiatrists. See *supra* note 183.

185. See Furby et al., *supra* note 156, at 25 (stating that the lack of a clear pattern in the results of the authors' study of sex offender recidivism makes even tentative conclusions concerning the effectiveness of treatment inadvisable).

186. See Robert Prentky & Ann W. Burgess, *Rehabilitation of Child Molesters: A Cost-Benefit Analysis*, 60 AM. J. ORTHOPSYCHIATRY 109, 111, 114–15 (1990) (noting some favorable, although admittedly inconclusive, study results for treatment and arguing that there is little support for the proposition that sexual abusers do not respond to rehabilitative treatment).

The weakness of the evidence supporting effective treatment of abusers could well help to influence a legislature not to grant privileged status to conversations between a child molester and his therapist. However, the unproven effectiveness of treatment does not provide a basis for favoring the attorney-client privilege.

likelihood of reoccurrence. The folly of preferential treatment for attorneys may readily be seen by imagining a scenario in which a lawyer has secured the confidential admission of her client regarding past abuse. She wishes to advise the client to seek treatment in hopes of preventing future abuse, but understands that any other professional to whom the client is referred will be required to report the prior conduct if disclosed during therapy. In that situation, preserving the privilege for the lawyer alone has limited utility and little theoretical cogency.¹⁸⁷

B. *The Rights-Based Justification*

A second major justification for affording privileged status to attorney-client communications is a rights-based argument that holds as its central goal the preservation of the client's autonomy.¹⁸⁸ This argument is that, in an increasingly regulated world, individuals have the right to be protected from encroachments by the state and by third parties. Lawyers are important in maintaining that autonomy by both enforcing affirmative rights and helping to avoid imposition of control by others. Complete information is required, the argument goes, for lawyers to achieve these goals. Moreover, when clients are required to share information with lawyers to protect or enforce autonomy interests, maintaining confidences also helps honor that autonomy by maintaining client control over private information.¹⁸⁹

Although not limited to criminal cases, the rights-based justification fits most comfortably with the function of the criminal de-

187. It is not completely illogical, however, to preserve the attorney-client privilege under the theory that the lawyer may help prevent crime, as she can warn the client of the consequences of law violation, advise the client to leave the environment where repetition would be likely, and generally counsel against future violations. See Mass. Bar Ass'n Comm. on Professional Ethics, Op. No. 90-2 (June 15, 1990) (discussing possibility that potential abuser would leave employment at camp for children). The arsenal of treatments available to the attorney is not impressive, however, and legislatures have apparently determined that giving other professionals the right to provide treatment they judge beneficial is not worth any additional risk to children.

188. Subin, *supra* note 74, at 1160-66; see also Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 355 (1981) (arguing that preservation of client's confidences is close to a categorical imperative, which is based on the obligation to serve rather than to participate in judging the client).

This argument is, broadly speaking, deontological, as contrasted with utilitarian justifications. See Pizzimenti, *supra* note 82, at 444-48.

189. Subin, *supra* note 74, at 1160; see Pizzimenti, *supra* note 82, at 446.

fense attorney, whose role is to protect the accused from the imposition of the state's punitive power. Even in this narrow form, the attorney-client privilege has had its detractors, most notably Jeremy Bentham, who argued that a guilty person should not have the help of the privilege in escaping punishment.¹⁹⁰ However, the principle that even the guilty are entitled to effective representation is deeply ingrained in our legal culture.¹⁹¹ Indeed, the rights-based theory remains the bedrock, and perhaps the only viable justification for protecting the attorney-client privilege in the area of child abuse.¹⁹²

190. 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 302-12 (London, Hunt & Clarke 1827). The flavor of Bentham's attack on the privilege is captured in his proposed statement by the attorney to a criminal defendant:

[T]he first thing the advocate or attorney will say to his client, will be,—Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.

Id. at 304.

Even commentators who argue against broad claims for lawyer confidentiality find a greater justification for confidentiality in criminal cases. See Subin, *supra* note 74, at 1167 n.358 (taking issue with Bentham's argument in the context of criminal litigation because of its relationship to the privilege against self-incrimination that should mean client's admission to lawyer should not be used to convict).

191. Professor Wolfram stated the point succinctly: "What divides communications about past crimes from those about future ones is that lawfully assisting a past wrongdoer to obtain an acquittal is an accepted contradiction built into the adversary system. The risk of undeserved acquittals is accepted as the price for vigorous advocacy in an adversarial system." WOLFRAM, *supra* note 71, § 6.4.10, at 279 (citation omitted).

192. As noted earlier, simply claiming that a right supports the privilege should prove effective or ineffective as a justification depending upon the legitimacy of the right claimed and its strength in comparison to other recognized rights. Although precise valuation of rights may be an impossibility, the right claimed should at least have a plausible claim of being the equal of whatever rights must be denied as the cost of its enjoyment. See *supra* note 167.

If one compares the importance of the rights involved, it is difficult to make a plausible argument that ensuring the personal autonomy of the client in all legal matters outweighs what must obviously be recognized as an important, indeed a quite similar, right of the child not be physically or sexually abused. Where, however, the substantial coercive powers of the state in criminal litigation are involved, the autonomy claim is potentially powerful. One can at least make a plausible claim that resisting encroachment by the state can constitute an equivalent right to that of the child. See Moore, *supra* note 167, at 213-14 (in criminal and not civil litigation, respect for human dignity of the defendant is arguably a paramount goal). Thus, as the client faces the real prospect of prosecution, a rights-based rationale offers substantial support for the attorney-client privilege.

In this context, the rights-based analysis begins to look somewhat similar to a utilitarian analysis with effective assistance of counsel as the objective pursued. However,

In summary, when one examines the area of child abuse and the legislative pattern of the reporting laws, one finds that the utilitarian rationale for the privilege is badly undercut if not entirely destroyed. The most attractive supporting argument—that the attorney-client privilege should be preserved to permit attorneys to encourage compliance with the law—is inconsistent with the denial of privilege to other professionals for whom the rationale would often have greater validity. The justification that protecting confidences is generally important to reaching accurate results in litigation is weak when examined separately in this area, because the goal of protecting powerless children conflicts with the most likely reason for clients' avoidance of full disclosure: the fear of revealing ambiguous but potentially damaging conduct. That ambiguous conduct might have involved abuse of a child, who may remain unknown and continue to be victimized unless the lawyer discloses the confidential communication. The balancing of expressed social interests therefore likely favors disclosure in such cases.¹⁹³ By contrast, there appears no express legislative purpose to inhibit the effective legal representation of those who may be charged with abuse, an area where the rights-based justification is most powerful.

whereas the utilitarian rationale supports the privilege where it aids determination of the truth, a rights-based rationale goes further and provides support regardless of the utility of candor in achieving a just outcome. Resisting the power of the state is a goal worthy of support under a rights-based argument, which, besides providing utility by achieving a just outcome, furnishes a modicum of protection to the autonomy of the client against a most powerful encroachment by the state.

193. This argument, while apparently reasonable, is probably unfair. It has long been recognized that any effort to test the privilege by separating out individual situations and requiring justification for each, particularly the most problematic ones, would result in rejection of the privilege. As Professor Wigmore argued, "[i]t is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth." 8 WIGMORE, *supra* note 16, § 2291, at 554; cf. WAYNE R. LAFAYE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2(b), at 26-31 (2d ed. 1987) (critiquing argument regarding the lack of empirical evidence for the deterrent effect of the Fourth Amendment's exclusionary rule); *id.* § 1.2(e), at 43-45 (rejecting contention that suppression should not be imposed in the most serious cases).

If the privilege is examined in individual circumstances, a similar negative judgment about the value of the privilege versus its costs would likely also be made in cases involving particularly dangerous criminals, such as homicidal individuals and major drug kingpins.

C. *Constitutional Bases for the Attorney-Client Privilege*

Whether legislatures can in fact limit application of the attorney-client privilege for potential or actual criminal defendants depends upon whether the privilege has a firm constitutional basis or is merely a creature of common law and legislative grace. The answer to that question is not in much doubt. Although often associated with constitutional rights and certainly protected at its core by at least the Sixth Amendment, most of the breadth and sweep of the attorney-client privilege is without constitutional protection.¹⁹⁴

1. *The Fifth Amendment's Non-Protection of the Attorney-Client Privilege.* In *Fisher v. United States*,¹⁹⁵ the Supreme Court ruled that the Fifth Amendment affords no direct protection for the attorney-client privilege when confidential client information is compelled from the attorney. As long as the state does not require the client to make statements to his lawyer in the first instance, the necessary element of compulsion is missing. Statements voluntarily made by the client, although covered by the attorney-client privilege, are not protected by the client's Fifth Amendment rights.¹⁹⁶ A number of federal and state courts have reiterated this point in various contexts,¹⁹⁷ including the observation that the scope of the privilege may be changed by state legislative action without violating *Fisher*.¹⁹⁸

194. WOLFRAM, *supra* note 71, §§ 6.2.1-6.2.4, at 248-50; see also *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986); *Strong v. State*, 773 S.W.2d 543, 547 (Tex. Crim. App. 1989) (en banc). But see Michael B. Dashjian, *People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CAL. L. REV. 1048, 1050-58 (1982) (arguing for a constitutional basis for the privilege under both the Fifth and Sixth Amendments).

195. 425 U.S. 391 (1976).

For the Fifth Amendment right to apply, three basic prerequisites must be met: the individual must face compulsion from the government; the statement must be communicative; and it must be incriminating. See generally Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 6-7 (1987) (discussing basic framework).

196. *Fisher*, 425 U.S. at 409-10.

197. See *Bradt v. Smith*, 634 F.2d 796, 800 (5th Cir.) (violation of attorney-client privilege cannot be asserted as basis of constitutional recovery), *cert. denied*, 454 U.S. 830 (1981); *Beckler v. Superior Court*, 568 F.2d 661, 662 (9th Cir. 1978) (*Fisher* does not incorporate attorney-client privilege into the Fifth Amendment); *OKC Corp. v. Williams*, 461 F. Supp. 540, 546 (N.D. Tex. 1978) (attorney-client privilege is rule of evidence, not principle of constitutional law).

198. See *State v. Jancsek*, 730 P.2d 14, 16-21, 24 (Or. 1986) (en banc) (*Fisher* not

The lack of Fifth Amendment protection for the attorney-client privilege does not mean that the government would be totally free to compel disclosures from the attorney. For instance, if a lawyer obtains information from a client under the explicit or implicit promise that the information is protected by a then-existing privilege and the lawyer later discloses the information under governmental coercion, that revelation may violate at least the due process rights of the client.¹⁹⁹ However, if the privilege were changed by legislative action prior to the client's consultation to eliminate the guarantee of confidentiality upon which the defendant may have relied, it is difficult to find much in the theory of the Fifth Amendment, or due process for that matter, that would render the legislative action unconstitutional.²⁰⁰

2. *The Sixth Amendment's Narrow Support for the Attorney-Client Privilege.* The Sixth Amendment right to effective assistance of counsel is a much more fruitful, but clearly limited, source of support for the attorney-client privilege. Although the Supreme Court has not established its precise contours in this context,²⁰¹ the right to counsel as it has come to be accepted in the latter half of the twentieth century surely includes some guarantee of confidential consultations with an attorney.²⁰² However,

controlling as to definition of attorney-client privilege, which was codified in the state with a specific history of the treatment of representatives of the client, and accordingly protections afforded vicariously to client's Fifth Amendment rights through the privilege are different than they would be under *Fisher*). See generally Reitz, *supra* note 164, at 637 (noting that *Fisher's* extension of attorney-client privilege to cover production of client's documents held by lawyer not binding on state courts, although its analysis has generally been followed).

199. *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

200. Presumably, if the privilege were so radically altered, lawyers would warn their clients of the dangers of full disclosure of incriminating information about child abuse without regard to how they currently feel about the need to disclose the limits of the privilege. See *supra* note 82. The number of damaging revelations by clients and concomitantly the basis for reporting would presumably diminish as a result of the warning.

201. There is, to be sure, some clear suggestion that confidential communications have a Sixth Amendment foundation. *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) ("[T]he Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney."). Furthermore, the Court has stated that deliberate invasions of the attorney-defendant relationship that result in prejudice violate the constitutional right to counsel. *Weatherford v. Bursey*, 429 U.S. 545, 552 (1977).

202. See *Bishop v. Rose*, 701 F.2d 1150, 1156-57 (6th Cir. 1983) (state court convic-

the Sixth Amendment right is quite limited in coverage. It has no place in civil litigation, and attaches in criminal litigation only when a suspect formally becomes the accused by indictment, preliminary hearing, or other similar step in the criminal proceeding.²⁰³

Accordingly, a legislature could constitutionally eliminate the protections of the attorney-client privilege except when criminal litigation has been formally initiated.²⁰⁴ This statement may seem

tion reversed by federal court based on state's use at trial of written document constituting confidential communication between lawyer and client); *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981) (communication covered by attorney-client privilege also protected by Sixth Amendment). See generally *United States v. King*, 536 F. Supp. 253, 263-66 (C.D. Cal. 1982) (outlining Sixth Amendment right against government intrusion into attorney-client relationship).

203. *Moran v. Burbine*, 475 U.S. 412, 432 (1986) (holding that Sixth Amendment attaches only after formal initiation of adversary judicial proceedings and the fact that pretrial event may have important consequences at trial is insufficient to trigger right to counsel); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977) (arraignment on warrant constituted initiation of formal charges that brought Sixth Amendment right into operation); *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (Sixth Amendment right attaches only at or after adversary judicial proceedings have been initiated by "formal charge, preliminary hearing, indictment, information, or arraignment").

This doctrine was applied in a recent opinion by the Maryland Attorney General. *Op. Md. Att'y Gen. No. 90-007* (Feb. 8, 1990). The question posed was whether mental health providers were required to report child abuse disclosed to them by a patient when the patient was referred to the provider by an attorney and thus the conversation was covered by the attorney-client privilege as construed under state law. The Attorney General concluded that in most instances a mental health provider was required by an unambiguous statutory obligation to report abuse even if the consultation was arranged by an attorney for legal advice. The attorney-client privilege would not provide protection against required disclosure except when it rested on a constitutional basis, and only after the suspect formally became the accused did the Sixth Amendment give constitutional support to the privilege. *Id.*

In some situations, the Sixth Amendment may protect confidential communications at an earlier point. Compelling confidential information from an attorney often has the effect of denying the accused the assistance of that particular lawyer by disqualifying counsel from representing the client further in the case. Where the accused had a substantial preexisting relationship with that attorney or where the attorney has special expertise, the required disclosure of information which results in disqualification at least raises a constitutional concern. See Michael F. Orman, Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145, 164. However, the argument for this position is not particularly strong, *id.*, and it is generally inapplicable to the factual patterns in which disclosures of child abuse would be compelled.

204. Important issues regarding the scope of the privilege would remain, of course. For instance, it is unclear how broadly or narrowly to construe a constitutionalized attorney-client privilege when the conversation is relevant to the charged crime but also involves a "separate" criminal incident. For example, in *People v. Belge*, 372 N.Y.S.2d 798

shocking, suggesting an unrealistic, apocalyptic result, but to the contrary is based on uncontroversial constitutional interpretation. The attorney-client privilege as it applies to reporting of child abuse and indeed to testimony by an attorney against the (former) client depends largely upon the good judgment of legislatures and their determination of sound social policy.²⁰⁵

(Co. Ct.), *aff'd mem.*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd per curiam*, 359 N.E.2d 377 (N.Y. 1976), discussed in note 67 *supra*, would the client's revelation regarding a separate murder be protected by the Constitution or could the state explicitly eliminate the attorney-client privilege in this context? The same type of issue would arise with regard to incidents of child abuse that might be relatively separate events, joinable at trial, or even admissible as "other crimes" evidence, see FED. R. EVID. 404(b), to prove guilt on the formally charged offense.

Whether the definition of a separate crime for purposes of limiting police interrogation of a suspect without counsel should be the same as that for purposes of defining the scope of constitutionally protected confidentiality between an accused and counsel is also not clear. See *Moran*, 475 U.S. at 431-32 (individual represented on burglary charge not covered by Sixth Amendment right to counsel with regard to questioning on unrelated murder charge); *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985) (individual formally charged on one offense could be questioned about new offense but statements concerning charged offense inadmissible under Sixth Amendment right to counsel).

If the scope of the Sixth Amendment is the same for both interrogation and the protection of confidences between the defendant and counsel, then that protection appears to be quite narrow indeed. See *McNeil v. Wisconsin*, 111 S. Ct. 2204, 2207 (1991) ("The Sixth Amendment right . . . is offense-specific."); *United States v. Nocella*, 849 F.2d 33, 38 (1st Cir. 1988) (federal charges involving distribution of cocaine distinct from formally charged state offense of marijuana possession in spite of existence of combined investigation by federal and state authorities into defendant's drug dealings); *State v. Bryan*, 551 A.2d 807, 809, 818 (Del. Super. Ct. 1988) (theft by false pretenses considered separate offense from murder under *Moulton* even though theft was apparent motive for murder and was jointly charged in indictment with it), *rev'd on other grounds*, 571 A.2d 170, 176-77 (Del. 1990) (relying on state constitutional rights rather than federal Sixth Amendment); *State v. Lale*, 415 N.W.2d 847, 848, 851 (Wis. Ct. App. 1987) (charges for possession of other weapons discovered pursuant to warrant issued to search for handgun used in murder considered unrelated under *Moulton*), *review denied*, 422 N.W.2d 860 (Wis. 1988).

205. Even though not protected by the Constitution in most contexts, no legislature is likely to undertake a wholesale elimination of the attorney-client privilege because the privilege enjoys such traditional acceptance in our culture and its preservation serves the interests of so many diverse social institutions. Rather, limitations upon the privilege are likely to take the form of modifications in discrete areas to meet specific concerns, such as child abuse reporting. The question for the future of the privilege becomes whether these discrete changes are isolated or numerous, whether they generate a momentum for additional limitations, and whether the new exceptions are interpreted broadly or narrowly by the courts.

V. CONCLUSION

I have argued above for two positions regarding the impact of current child abuse reporting legislation on the attorney-client privilege. First, with the possible exception of one state,²⁰⁶ the legislation does not indicate any intention to abrogate the attorney-client privilege as it has been historically interpreted. Second, absent an affirmative restriction of the privilege by statute, the attorney-client privilege should be interpreted to prevent compelled reporting of child abuse based on information that would be covered if the lawyer were called to testify.

Given the above two propositions, the conclusion follows that, under ethics rules regarding confidentiality, a lawyer is not entitled to reveal information under the theory that she is required to do so by other provision of law—there is no such legal requirement for disclosure of information covered by the attorney-client privilege. However, information covered only by the broader ethical rule protecting confidential information is subject to the requirements of mandatory reporting laws, which do constitute a superseding legal duty to report; and the ethical rules, as contrasted with the attorney-client privilege, provide no basis to protect the lawyer against criminal prosecution if she fails to report. Thus, in states with mandatory reporting laws applicable to lawyers, a lawyer must report information about abuse when, for example, she learns about it through a third party or in a conversation that is not made confidentially.

Reporting of child abuse may be authorized under the exception to the confidentiality requirement where the lawyer has substantial evidence that the client will commit future abuse. Categorical statements cannot be made regarding the effect of all revelations of past child abuse because the determination in each case will be heavily fact-bound. The inquiry will remain a difficult one, and ethics rulings that stay true to sound principles cannot make the determination simple.

Unfortunately, the above propositions do not appear obvious from the face of the various state reporting statutes, which were drafted without any explicit focus on the obligation of attorneys to disclose confidential information. Moreover, there is an urgent

206. That state is Mississippi. For a discussion of the Mississippi statutes, see *supra* notes 45, 47 and accompanying text.

need for clarification of the law in this area to cut through a procedural thicket created by the combination of mandatory reporting duties enforced by criminal sanctions that require prompt compliance and ethics rulings that can determine only questions of confidentiality but cannot definitively interpret other relevant legal doctrines. Although courts and, to a lesser degree, ethics panels can provide some assistance, legislative action is probably required to avoid disclosure by lawyers, who understandably will act out of a need for personal and professional self-protection.

In addition to eliminating uncertainties in the law, the legislatures may wish to examine the basic nature of the protection afforded to confidential information under the attorney-client privilege and reform this aspect of the law as it relates to child abuse reporting. Three basic reforms may be considered:

Option I: Full Protection of Traditionally Privileged Communications. If a legislature wants to provide robust protection to the attorney-client privilege, it should declare an intention to extend the protection of the attorney-client privilege to otherwise required disclosures under mandatory reporting requirements. This declaration necessarily implies a reaffirmation of the historically optimistic judgment that the assistance of counsel is on a broad scale an instrument of social benefit.

Option II: Robust Protection of the Rights of the Potential Criminal Defendant. A state wishing to give substantial but limited protection to the attorney-client privilege that will facilitate effective consultation in most situations may want to abrogate the attorney-client privilege in child abuse cases but exempt from reporting requirements statements made to an attorney in confidence for the purpose of obtaining legitimate legal advice by someone who is or who may become the criminally accused.²⁰⁷ This option best balances the competing interests involved in the privilege as traditionally recognized with a vigorous social policy of combating child abuse.

Option III: Minimal, Constitutionally Sufficient Protection. A state that wishes to pass constitutionally acceptable legislation

207. This option is modeled on the protection of the privilege afforded in Nevada. See NEV. REV. STAT. § 432B.220(2)(i) (Michie 1991).

designed to produce the maximum child abuse reporting by attorneys and accordingly the minimum protection to relevant confidential information should abrogate the attorney-client privilege except for confidential communications between a defendant formally charged with child abuse and his attorney with regard to his legal representation in that case.

Before a legislature takes action on any of these three basic models, it needs to reach a conclusion about two sets of issues. The first is a fundamental determination, discussed above, about both the relative worth of lawyers as agents for positive action and the extent of protections to be afforded to those who may become criminal defendants charged with child abuse. The second is an equally basic, perhaps fundamentally more important, judgment about the role and the extent of criminal law regulation in our society.²⁰⁸

The most novel aspect of the legal doctrines discussed in this Article is the use of criminal sanctions to enforce reporting of confidential client information that is reflected in the basic design of child abuse reporting statutes. The requirement under penalty of law that crime must be reported is not new to our history,²⁰⁹

208. Some people will immediately move to have the legislature impose an unequivocal duty on lawyers to report suspected abuse, explicitly abrogating the attorney-client privilege, and will do so with the absolute best of motives to protect our children. Letter from John S. Niblock, President, North Carolina Child Advocacy Institute, to Robert J. Robinson, Chairman, Ethics Committee, North Carolina State Bar Ass'n 1 (Sept. 10, 1991) (on file with author). Such calls for action are appealing in the important cause of doing something about child abuse, but I contend the changes would be largely ineffective for that purpose and otherwise quite unfortunate.

209. As part of a set of common law duties to report crime and to aid in the apprehension of the perpetrators, English law recognized the crime of misprision that "made it the duty of every citizen to disclose any treason or felony of which he had knowledge." 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 388-89 (1927); see also *Sykes v. Director of Pub. Prosecution*, [1962] A.C. 528, 560 (1961). See generally P.R. Glazebrook, *Misprision of Felony—Shadow or Phantom*, 8 AM. J. LEGAL HIST. 189 (1964); P.R. Glazebrook, *How Long, Then, Is the Arm of the Law to Be?*, 25 MOD. L. REV. 301 (1962) [hereinafter Glazebrook, *How Long, Then*].

Misprision of a felony would therefore appear to be a crime that attorneys too could commit and that might have provided a fertile testing ground for the operation of the attorney-client privilege and ethical issues presented by child abuse reporting laws. By and large, this did not prove true in the United States for a number of reasons. First, some jurisdictions, such as the federal government, limited the definition of the offense. They required actual concealment of a crime rather than simply knowledge of its occurrence. See, e.g., *Lancy v. United States*, 356 F.2d 407, 410 (9th Cir.), cert. denied, 385 U.S. 922 (1966); *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934). Or, they

but using criminal penalties to encourage crime detection is certainly atypical.²¹⁰ It is a small part of the increasing overall regulation of our society and particularly a growing tendency to use the criminal law in attempting to solve every difficult social problem. These trends should be matters of great public concern.²¹¹

required witnessing of the crime or its preparation. See, e.g., WASH. REV. CODE ANN. § 9.69.100 (West 1988). In both instances, the traditional attorney-client privilege would not apply under ordinary analysis. See *supra* note 47 (observations generally not protected by privilege); *supra* note 132 and accompanying text (involvement by lawyer in criminal enterprise not protected by privilege). Second, the attorney-client privilege was recognized explicitly as an exception to the duty to report. See, e.g., OHIO REV. CODE ANN. § 2921.22(E)(1) (Baldwin 1992).

Third, the crime has rarely been prosecuted, principally, it seems, for policy reasons. As Chief Justice Marshall put it in *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556 (1822): "It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man." *Id.* at 575-76. Largely based on policy, several states have officially abolished the crime. See, e.g., *Holland v. State*, 302 So. 2d 806, 808-10 (Fla. Dist. Ct. App. 1974) (misprision is incompatible with modern concept of personal freedom); *Pope v. State*, 396 A.2d 1054, 1068-78 (Md. 1979) (discussing history and shortcomings of crime, and concluding that it was incompatible with modern values). See generally Robert E. Meade, Comment, *Misprision of Felony: A Crime Whose Time Has Come, Again*, 28 U. FLA. L. REV. 199 (1975) (analyzing history and shortcomings of traditional definition of crime and arguing for revival of narrow version of offense); Carl W. Mullis, III, Comment, *Misprision of Felony: A Reappraisal*, 23 EMORY L. REV. 1095 (1974) (tracing development and criticism of common law crime; arguing for usefulness of offense if narrowed to limited number of crimes and restricted group of reporters; and recognizing defense to crime for information covered by traditional privileges, such as attorney-client privilege). Abolition is not universal, however. See, e.g., *State v. Carson*, 262 S.E.2d 918 (S.C. 1980) (misprision remains crime in South Carolina); see also John H. Hare, *Annual Survey of South Carolina Law: Criminal Law*, 33 S.C. L. REV. 1, 65-69 (1981).

The most interesting point from this history is that the common law definition of the crime may indeed have recognized a defense for the attorney-client and other "evidentiary" privileges. In *Sykes*, Lord Denning noted that "[n]ondisclosure may sometimes be justified or excused on the ground of privilege," observing specifically that it would be no misprision for a lawyer, who had been told by his client that he had committed a felony, not to report it to the police on the basis that he had a duty to keep the information confidential. [1962] A.C. 528, 564; see GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 426 (2d ed. 1961) (interpreting Lord Denning's somewhat peculiar statement in *Sykes* that the lawyer would have a "claim of right made in good faith" to mean that the professional confidential relationship in fact provided justification for non-disclosure).

Finally, there appear to be no cases in which attorneys have been prosecuted for misprision where the conduct involved only failure to report knowledge of a crime.

210. Op. Md. Att'y Gen. No. 83-001 (July 18, 1989) (absent specific statute, no citizen has a legal obligation to the state to report a suspected crime).

211. Professor Fried has argued that this general tendency "to federalize state crimes and to criminalize common law torts . . . has placed a new power in the hands of federal prosecutors" resulting in "unprecedented intrusions into attorney-client relationships"

In 1983, Senator Arlen Specter proposed legislation that would have moved us to a new level. In the wake of the debate and the vote of the House of Delegates of the American Bar Association approving the Model Rules that require only limited disclosure of clients' illegal plans, Senator Specter proposed legislation that would have created a duty, enforced by federal criminal penalties, for a lawyer to report both future criminality and past crime when the lawyer's services had aided the scheme.²¹² It would have constituted a modern-day revival of the crime of misprision, this time directed uniquely at lawyers, and would have exhibited most of the historical weaknesses of misprision in being tremendously broad, vague, and intimidating.²¹³ Fortunately, the proposed legislation died quickly.²¹⁴

Clearly, the reporting of child abuse does not take us to that brave new world. It is a step in that direction, however; and so legislatures should avoid too quickly deciding that lawyers, because they may be propitiously situated, should be required under criminal penalties to report what they know and what they suspect about their clients. The protection of children from abuse would be rendered only the most minor aid by such a development. Lawyers are rarely among the first to learn of abuse,²¹⁵ and the net loss of information occasioned by the privilege is relatively minimal as it is the privilege's very promise of confidentiality that encourages the initial candid and damaging revelation.²¹⁶ Overall,

through the "crime-fraud" exception. Fried, *supra* note 64, at 499.

212. S. Res. 485, 98th Cong., 1st Sess. (1983), *reprinted in* 129 CONG. REC. 2281 (1983). The bill was entitled "The Lawyer's Duty of Disclosure Act of 1983" and combined the broader disclosure requirements of the Kutak Commission with the federal mail fraud statute. 129 CONG. REC. at 2283. The federal jurisdictional element was provided by the mailing of some document helpful in the illegal scheme.

213. One of the worst and most criticized features of the crime of misprision of a felony was its incredible breadth and vagueness. *See, e.g.,* Pope v. State, 396 A.2d 1054, 1074-78 (Md. 1979) (finding that the crime is unacceptable by modern standards and holding that it is not a chargeable offense under state law); Glazebrook, *How Long, Then*, *supra* note 209, at 311-12. For a discussion of misprision of felony generally, see *supra* note 209.

214. While hearings were conducted, the witnesses appearing were generally critical of the proposal, *Senate Panel Holds Hearing on Proposed Lawyer's Duty of Disclosure Act*, 33 Crim. L. Rptr. (BNA) at 2103 (May 4, 1983), and no congressional action was taken on the bill.

215. *See* Besharov, *supra* note 22, at 476-77.

216. Opponents of the privilege often miss the point that the conversations that the privilege keeps confidential would likely never have occurred in the absence of protec-

the precedent set for lawyers as reporters of crime and as informants on their clients, although capable of being limited to the child abuse area, will likely have far-reaching, unfortunate consequences that outweigh the beneficial effects of potentially increased reporting in combating the horror of child abuse.

tion. See Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 610-11 ("Because the same information might not exist were it not for the privilege, any loss of information when the privilege is upheld may be more imagined than real. Without the privilege, there might be less information, because the communications between attorney and client would be changed.") (footnotes omitted); *Developments in the Law*, *supra* note 131, at 1508 (arguing that because of this point, "evidentiary costs are less weighty than utilitarians have traditionally assumed") (footnotes omitted); see also *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (noting that "the attorney-client privilege puts the adversary in no worse position than if the communications had never taken place").

Thus, if the privilege is removed for conversations with attorneys, some more information will be made available to the prosecution, but particularly if lawyers advise clients of the prospect of disclosure, the amount of that additional information is likely to be relatively minimal.